THE *MARQUES* of *ARGYLL* HIS DEFENCES AGAINST THE GRAND INDYTEMENT OF HIGH TREASON, Exhibited againſt him to the PARLIAMENT IN SCOTLAND.

Anno 1661.

ADVERTISEMENT.

READER, be pleaſed to know that there was ſome ſhort Anſwers printed formerly to this grand Indytement, as alſo in anſwer to the other printed particular Charge at the inſtance of Sir *James Lamond*, which were only penned upno the firſt view of the two charges, and publiſhed to give a compendious clearing till their following defences ſhould be made ready. You are likewiſe to expect additional afterward.

THE MARQUES OF ARGYLL

His Defences to The maine Charge of High Treason

Preface

THe defender profeſſes his ſenſe of the mercy and hapineſſe of the land, that we are delivered fra the lawles arbitrary power of the armed force of cruell uſurpers, and have reſtored to us our only lawfull ſoveraign Lord, and in his ſacred perſon, the authority of law, the order of Legall judgment, and in them the liberty of legall defences, thereupon depend, the great ſecurity of the liberties lives and eſtates of the

ſubject, this gives the defender confidence to appear in Judgement, nothing doubting of a faire procedure and full hearing compleate time being allowed in all the dyets of the proces, and all things therein ſo ordered as may be ſuitable to the juſtice and gravities of this high and honourable court, and the importance of the cauſe juſtice, not only as to the defender but juſtice as to the preparative & conſequence, and he with much confidence expects all juſtice from his moſt gracious ſoveraign the juſteſt of Princes, and who is repreſented and acting by ſo truly noble a perſon as My Lord commiſſioners grace, alſo hoping the honourable court of *Parliament* will without all prejudice Impartizally conſider his legall and juſt defences, and that they will proceed ſo far without all ground of ſuſpition therein, that any who is within degrees to perſons againſt whom he is libelled to have committed any of the deeds which are made the ground of his dittay, or if any are conſcious to themſelves of capitall enmity or has been any wayes informers againſt the defender, or have predetermined by uttering the judgment already of his cauſe, conſcience and honour will will make them abſtaine ſitting and voteing therein, So much the more that they ſee howunwilling he is to propone any recuſatoryagainſt any member of the houſe upon theſe or others grounds in law, ſo confident is he of the vindication of his own carriage, So much he deferres to the ingenuity or generoſity, and ſo high is the honour he beares to this honourable court.

Firſt it is alledged That there be no proces, nor is the defender holden to anſwer till the whole lybell and all the parts thereof be given him up to ſie alſo it is the commiſſioners inſtructions and addreſſes ſent and made to his Majeſty by the defender (as is alledged) and the commiſſioners at *Breda* are expreſſely repeated as a part of the libel *brevitatis cauſa*, in the tenth article, and yet the ſame we has not been produced nor given to the defender to ſee and adviſe with, Till which be done he cannot be held

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in to answer like as where points of the dittay are founded upon wreat. The defender craves that he may have up the writes whereupon the same are founded to see, before he beholden, to answer to the dittay which is very consonant to law, *l.* 1. Sect. 3. *F. de cedendo ubi edenda sunt omnia quæ actor edituras est apud judicem et* l. 3. *eod. eodem*, whereby the persever is ordained to show to the defender all that he will use against the defender before the Judge. Other wise the defender cannot prepare himself for his defence which is the reason given in these laws, *Paulus* lib. 5. cent. 16. and the Doctors throughout the saids laws. *& l. unius* Sect. 9. *F.* de quest. *post alios* so *l.* 2. *Mun.* 3. 4. 5. 6. *co. de edendo Bart. ad leg. ubi min.* 8. *F. de* quest. For soe, It is the are severall Articls in this dittay founded upon wreat not produced as in the first articles the prosecution of Mr. *John Steward* to death, as a leasing maker between the King and his Subjects lybeled and yet neither libel nor sentance against Mr *John* produced.

Item. Collonell *Henrisons* commission for keeping *Dumbartan* Castle is libelled, and the commissione not produced.

Item. In the sixth Article a capitulation alledged made and subscribed be the Laird of *Ardkinglos* and other officers, under the defenders command with the Laird, of *Lawmont* and *Escog.*

Item. The assurance alledged given to the persons within the house of *Lochhead* mentioned in the seventh article, the defender craves *ante omnia* It may be produced.

Item. that ordinance of *Parliament* or commitee of estates thereby it is libelled In the same seventh article that *Cadkitoch* was ordained to be brought from the prison where he was for the time &c. to the town of *Edenb.*

Item. In the ninth article the defenders protestation *Parliament* anno. 1648.

Item. in the same article the letter written to *Cromwell* libelled as being dated the 6 of *October* 1648. whereby it is lybeleld

belled that the defender and his complices wrote to *Cromwell*, &c.

Item. In the ſame article Sir *Iohn Cheeſlies* inſtructions libelled as being dated the 17. of *October* 1648. deſiring the perſons taken in the ingagement to be detain'd as pledges of that Kingdoms peace.

Item. Eod. Art. the warrand alleadged to be under the defenders hand for a proclamation againſt the families of *Ogilvi* and *Rari*.

Item. Art. 10. The letter alledged written to *Cromwell* anno 1650 after his invaſion.

Item. eodem Art: the act of the weſt *Kirk* with the declaration whereunto it relates.

Item. Act. 11. The remiſſion alledged given to *Iohn* Mc. *Dogall* of *Dimolich.* under the defenders hand

All which the defender humbly alledges ought to be given up to ſee before he be held in to anſwer eſpecially *poſt tanti temporis intervallum* ſo long a time haveing intervented between the intention of this perſute, and the dates of the ſaid *Act* and papers foreſaid lybelled on. Some of them being twenty years ago ſome fifteen, and the lateſt ten or eleven years, as has always been the practiſe in ſuch caſes and may be inſtanced in my Lord *Balmerino* his proces, and was found by this honourable court in Mr. *James Guthries* proces.

Secundo under proteſtation that the former exceptation may be firſt diſcuſt, that the papers therein mentionate *ante omnia* be given up to the defender to ſee, it is alledged that as it has been alwayes the Princely care of his Majeſtys, royal anteſeſſours, to keep the Laws of this realm certain *Ne dum incerto itemur ineſtuctuaret reſpublica*, and leaſt law which is introduced for the leidges ſecurity ſhould become their ſnare therefore be King. *Ia. i.* that illuſtrous Prince *Parliament 7. cap.* 107. All the interpretation of his Majeſtys ſtatutes, otherwiſe then the ſamen beares is forbidden, and if forbidden can be no ground of dittay, and in effect to found a ditty upon ſtatutes otherwayes then they bear were to found it upon ſuch ſtatutes we have not, bot ſo it is in the propoſition of this libel

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The Acts of Parliament where upon the ſame is founded, are otherwiſe repeated than they bear for. 1. The firſt part of the propoſition of the Dittay founded upon the two firſt Acts of Parliament lybelled, *viz.* the third Act of the 5. Parl. of King *Jac.* 1. And the firſt Act of King *Jac.* 6. doth upon the ſaid acts, conclude the pain of forfeiture and treaſon. The ſame is moſt Irrelevant becauſe in the ſaid Acts, there is no mention made of any crimes of the nature or quality libelled. The ſaid 3. Act of the 5. Parl. *Jac.* 1. being annent the fees of Craftsmen, and the price of the work. And, the 1 Act of K. *Jac.* 6. being anent the conſtitution of the Earl of *Murry Regent*, and in neither of the ſaid Acts is there any pain or puniſhment inferted, and ſo far leſs can the pain of forfeiture or treaſon be from the ſaid Acts concluded againſt the defender; and if it ſhould be ſaid, That the 5. Parl. of K. *Jac.* 1. is miſtaken in the wryting for the firſt Parl. And in citing the firſt Act of K. *Ja.* 6. the citation of the number of the Parl. is alſo omitted, *viz.* the number 18. The Dittay repeats theſe two acts otherwayes then they bear, for the words of the ſaid 3. Act of the 1. Parl. being *Jac.* 1. ſtatutes and ordains, That no man openly or notoriouſly rebel againſt the Kings perſon, under the pain and forfeiting of life, lands and goods, which is not at all in the Lybel repeated. And as to the ſaid 1. Act of the 18. Parl. being *Jac.* 6. The words thereof are cited, yet with ſome difference and tranſpoſition lybelled, but thereto is added the ſanction and pain, That whoſoever doth in the contrary, they are to be puniſhed as Traitors, and to forfeit their life, lands and goods, whereas there is no ſanction or pain in the ſaid Act, only it is declarative of his Majeſties prerogative, and of his three Eſtates to maintain the ſame.

Item. In the ſecond part of the propoſition of the Dittay founded upon the 25. Act of the 6. Parl. being *Jac.* 2. and the 75. Act. 9. Parl. *Q. M.* Is not repeated as it bears as to puniſhment, for therein they who attempt to do or raiſe any bands of men, of War, Horſe or Foot

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without any ſpecial licence of his Majeſty, and his Succeſſors, are only declared puniſhable by death, whereas they are lybelled to be puniſhable as Traitors, while it is the pain only of the ſaid 25. Act. Parl. 6. *Jac.* 2.

Item. In the next Parl. of the propoſition of the Dittay founded upon the 43. Act. 2 Parl. *Jac.* 1. and the 134. Act of the 8. Parl. and 10 Act. 10. Parl. and the 205. Act. 14. Parl. of King *Jac.* 6. None of theſe Acts are repeated as they bear, but confounded, both as to the crimes and pains therein contained, to a very far different ſenſe (as is humbly conceived) from that which the ſaid acts ſeverally propoſe. Transferring the pains of the ſaid ſeveral acts and crimes therein contained from one to another, as may appear by what follows, for the firſt of theſe Acts, being the 43. Act Parl. 2. *Jac.* 1. Is only of leaſing Makers and Tellers of them which may engender ſtrife between the King and his people, and the pain of the Act is tinſel of life and goods to the King, as is clear both by the title and body of the act. The ſecond act, *viz.* the 134 act, 8. Parl. K. *Jac.* 6. is alſo the ſame crime, *viz.* againſt thoſe that utter falſe, ſlanderous and untrue ſpeeches, to the diſdain, reproach or contempt of his Majeſty, his councel or proceedings, or to the diſhonour of his Majeſties parents and progenitors: adding alſo thoſe meddle in the affairs of his Majeſty, and his Eſtates, and the pain is the pain contained in the acts of Parliament made againſt Leaſing Makers and the Tellers of them. The 3. is the 10. Act. 10. Parl K. *Jac.* 6. Is againſt thoſe who ſpeak or write any purpoſe of reproach or ſlander againſt his Majeſty, Perſon, Eſtates, or Government, or depraves his Lawes or acts of Parliament, or miſconſtrues his Majeſties proceedings whereby any miſ-believing may be moved behind his Majeſtie and Nobility, and his loving Subjects. And the pain thereof is only the pain of death. And by the 205. Act 14 Parl. *Jac.* 6. Theſe that hears the ſaid words leaſings, and doth not apprehend and reveal the Authors thereof, ſhall incur the like puniſhment with the principal offenders, and yet leaſing

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making and telling which is the crime punishable be the first of these Acts, *viz.* 43. act Parl. 2. *Jac.* 1. Is punishable be the loss of life and goods to the King is omitted, and false slanders which is the crime contained in the 134 act, Parl. 8. *Jac.* 6. And only speaking to the dishonour of his Majesty, Parents and Progenitors, and medling with the affairs of his Highness Estate is repeated out of the said Act 134. and joyned to the crime contained in the said Acts 10. Parl. 10. *Jac.* 6. and to both the pains added of loosing life, lands and goods, whereas the pain of the said act 10. is only of death; and the pain of the said 134. Parl. 8. *Jac.* 6. Is only the pain contained in the Acts against leasing Makers which in the said 43 act Parl. 2. *Jac.* 1. Is only the loss of life and goods, and not of life, lands and goods, but all annerly the Escheates of goods moveables, as may appear, First, Because whenever the pain of tinsel, of life and goods is found either in the Acts of Parliament or old Lawes, goods are understood moveable, as is clear from the crimes that are ordained to be so punished, as Manslaughter. Be the 42. stat. *Robert* 3. Is prohibited under the pain of tinsel of life and goods, where *Skein* explains, that these goods are to be understood of Moveables. And be the Act 90. Parl. 6. *Jac.* 1. The receipt of him who is fugitive for slaughter, is forbidden under the pain of tinsell of life and goods (Where *Skein* expounds goods to be goods moveable, in his Tractat of Crimes tit. 2. *cap.* 6. Parl. 4.) And so it is clear in the other acts of Parliament that their whole pains are distinct, *viz.* Tinsel of life and goods alike, is only extended to moveables; and tinsel of life, lands and goods, which latter pain in the stile of our acts of Parliament is commonly thus expressed: That he who incurs it, shall die and forfeit life, lands and goods. as the 31. Act, Parl. 7. *Jac.* 2, *& passim alibi* forfeiture properly relating to lands; and in the common signification of our said goods to be understood of goods moveable.

Secundo. More specially it may appear, that the pain of the said 43. act. Parl. 2. *Jac.* 1. given to the said 134. act

Parl. 8. *Iac.* 6. relates in the pain thereof, is only the pain of escheat of Moveables, because the pain of forfeiting of life, lands and goods, is the proper pain of the crimes that by our Laws are declared Treason. And therefore *Skeen* both in his Index of the acts of Parliament on the word Treason, refers the crimes that are so punishable to the head of Treason, as also in his Tract upon crimes in the end of *Reg. Maj.* But doth not at all mention therein the crime of the said 43 act. Parl. 2. *Iac.* 1. nor of the 134. act. Parl. 8. *Iac.* 6. nor of the other acts whereupon this part of the proposition is founded. But in his Index hes the crime of leasing making between the King and his people under a head by it self, and therein expressly mentions both the said 43. act. *Iac.* 1. and 134 act. *Iac.* 6. like as in the said Tractat of crimes after the Chapters of Treason and points thereof. *cap.* 1. and pain of the same, which *cap.* 2. he expressly sayes, is the tinsel of life, lands and goods, and declares, that he understands by goods, moveable goods, and anent the process and Judge of the crime of Treason, *cap.* 3. when he comes to other crimes capital, of all which the pains are either the tinsel of life and moveable goods, or life only, or of some less pain in body or goods, but never of life, lands and goods, as is clear thorow the whole tractat that follows. And in his 12 *cap.* anent the crime of falsit, he hes the crime of leasing making between the King and his people. And the same acts of Parliament, *viz.* act 43. Parl. 2. *Iac.* 1. And the 25 act. Parl. 14. *Iac.* 6. and in his 25. *cap.* hes the crime of infamous and seditious Lybels. And the said 10. act. 10. Parl. *K. Iac.* 6. cited therefore.

Item. In the last two acts of Parliament whereupon the proposition of the Dittay is founded, *viz.* the 37 act. 12 Parl. *Iac.* 1. and 144 act. Parl. 12. *Iac.* 6. *It* is lybelled. That all Recepters, Suppliees, or Intercomoners, with any Traitors, are punishable by forfeiture, as the Traitors themselves, which is not as the act bears, for both the crime and pain lybelled out of the said 144 act. 12. Parl. *Iac.* 6. The act is not simply against those who intercomon with traitors

and rebels, but with such as are *declared* rebels and traitors from all which it follows, that the proposition of the lybel is founded upon the acts as they are lybelled, is not relevant And therefore the Defender ought to be assoliezed *ad hoc libello.*

Tertio. As to the last part of the proposition of the Dittay, the Defender abhors so much the crime therein mentioned, that he thinks any person who will conceal any malicious purpose wronging in the least, far more in putting violent hand in the inviolable sacred person of his Soveraign Lord, were unworthy to breath in common air, let alone to be defended; And is so conscious to himself of his own innocency in any such things, that he needs no other defence, but the confident denial of any guiltiness, therein either less or more, but before a practique pass in this honourable Court of Parliament of founding a dittay of Treason upon common Law and Practise. It is under protestation foresaid, and with all humility alledged against the relevancy of that part of the proposition as founded upon the said common Law and practise, That it is not relevantly founded thereon in so far as by the 28 act. Parl. 1640. it is expresly found and declared Traitors, but after tryal by the Parliament or Judges ordinary; And finding that the said persons have contravened a Law and act of Parliament, made under the pain of treason, and therefore a person cannot be declared guilty of treason on a dittay founded on common Law and practise. 2. *Pœna* being *legis sanctio.* And the common Law is known with us to have only *vim rationis, non legis*, and therefore no pain, but especially the highest of pains can be founded thereupon; and 3. Specially as the practise beside the reason aforesaid, because *L. 1. §. 4. fad. Senat. Consult. Turpilianum facti quidem quæstio in arbitrio est judicantis, pœna vero persecutio non ejus voluntati mandatur, sed legis authoritati asservatur*; whence *Menochius* lib. 5. Presumpt. cap. 29. *in principio* saith expresly, *pœna indici non potest nisi expresso jure sit cautum per l. at si quis divus fad. Reli & sumptibus funerum.*

nerium. And it is the common opinion of the Doctors, That ever when punishment is not expresly defind in the Law, but is permitted *arbitrio judicis.* It cannot be extended to death, far less to the pain of Treason. And the foresaid act of Parliament 28. act *anno* 1640. takes away the relevancy of founding treason upon common Law and practise, as said is.

4. If a dittay to infer the crime of treason might be founded on practise, either of the justice Court or Parliament, which are two courts, before which crimes of treason are judged; yet our practise is *consuetudo rerum ita judicatarum*, as *Craig* defines it, *lib.* 1. *de feudis dig.* 8. and therefore to it as to the introducing of all other consuetudes, there must be *Actuum frequentia*, reiterated acts and practices *per l. de quibus ff. de legibus & Cart. Jason*, and other Doctors: on that Law, *Et per l.* 1. *Cod. qua sit longa consuetudo & L. & in totum* 3. *c. de cref. dif. privat.* 2. *illud explorandum. An contradicto aliquo judicio sit firmata.* That is, it would be tryed if decreits *in foro contradictorio* hath been given thereupon. As also saith *Craig. dicta disg.* 8. *in fine*; and if in any case, that ought to be far more in crimes; and if in crimes, yet more in the highest of crimes. And in all concernments of one of the most eminent Peers of the land, which is clear: for in matters civil (how small soever) before the session a practise will never be founded on some decreits given either for not compeirance, or on compeirance where there is little or no dispute, or it may be great inequality in Advocats of the two parties. And if in civils where the interest is only pecuniary, this ought to be much more in lybels of Treason, as hath been said; but so it is, neither in Justice, Court not Parliament will it be found, that it hath been frequently judged, and in *foro contradictorio* on and dispute where this defence hath been propounded. Yea, it may be well alledged, that there can be no practise shewed of either of these Courts that any hath been found guilty of treason but on some act of Parliament under the pain of Treason, as is said; But however the said 28 act. Parl. 1640. is most clear, which is most agree-

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able to reaſon, and the Law of *England* very laudable in that point; as *Cook* hath it in his Chapter of *Treaſon*, and therefore the lybel as founded on practiſe is no wayes relevant, and the defender ought to be aſſoilzed therefrom.

Quarto. Every Lybel both of civil Law, and our Law ought to be clear, diſtinct and ſpecial, but eſpecially criminal lybels, becauſe of the great importance of them, ought to be moſt clear, diſtinct and ſpecial, *jure libellus in criminalibus debet eſſe clariſſimus*, ſaith *Dam. haud prax. crim.* 3. *num.* 3. And therefore *Libellus Criminalis obſcurus parte etiam non excipiente extenditur favore rei Baldus in lege addita, num.* 10. *c. de edendo*, *Alex. Conſil.* 72. *col. verſit. & licet volum.* 1. *hip. Conſil.* 49. *& Battander prax. Cran. Reg.* 6. *ſ.* 3. *&* 4. *nec enim debet accuſator cum exiſtimationis alienæ jactura, & diſcrimine vagari. licet L. ſi in rem. ff. de rei unum*; ſo that any obſcure criminal lybel is inept, and the defender ought to be aſſoilzed therefrae, though he did not oppone his defence for that effect, but ſo it is, this dittay is moſt unclear and undiſtinct, in ſo far as in the propoſition of the dittay there are many acts of Parliament libelled on, being ſtatutes annent diverſe crimes of very different natures, and inferring different puniſhments, according to the article of the crimes, and in the ſubſumption, the panel is indyted for ſeveral crimes alledged committed by him, contrary to the ſaid Lawes and acts of Parliament in general, without condeſcending on the particular acts of Parliament, that the pannel has contravened by committing the particular deeds lybelled, and ſo leaving him to great uncertainty: whereas in all Law, reaſon, and form of proceſs, the defender ought to be certified what acts and Laws he has contravened by committing ſuch deeds that is in a multiplicity of crimes, after propoſing all the ſtatutes relating to the ſame crimes, all the deeds immediatly ought to be ſubſumed, falling under the compaſs of ſuch ſtatutes, and thereafter the acts relating to another indifferent crime ought to be propoſed, and the deeds falling under the compaſs of theſe acts immediatly ſubſumed

zed and throughout the libell which is no way done here, but first by many different acts accumulat together in the proposition, and then the most different facts accummulate together indistinctly in the subsupmtion Not condesending on the Acts by them contravened and therefrae the libel is inapt and the defender ought to be assoyled their from.

This defence is further confirmed in law. 2. Because a libell being sillogisums *quidem practicus*, *jason* and the *doct pr instit, de act in criminal* dittays the proposition consist *in jure constitutionis* in the Laws whereupon the libel is sounded The manner is in the subsumption of the facts or crims under these laws and the conclusion inferring the paine Because of such a crime as falling under the law libelled, on a very essentiall part of every libel, is *quo jure petatur* & a libel being incertain in this is *unclear aud uncertain* in a very essentiall point and in apt. 3. In law, a libell ought so to be conceived as the defender may know *actionis speciem* otherwise it is in apt l. f. *de edendo* l. 3. *c. eodem.* And may also know *actionis jus*, and that he may deliberat how to defend but in our cases that arises from the distinct application of the lawes to the facts, *ex quibus jus oitur* 4. If such uncertain libel were admitted the defender because of the obscurity and uncertainty of the libell, should be prejudged of an certain defence he could make against the relevancy of the same because the relevancy of it consists in the subsumption of the facts and crimes libelled under some certain law, which being condescended on be a distinct subsumption under each law of the crimes that were libelled properly to fall under the same, The defender would alledge why such crimes cannot be subsumed revelantly under such laws and acts which he otherwise cannot do in such multiplicity both of different acts and crimes as are libeled in this ditty There being not only in diverse articles but even in on article a great diversity of the crimes therin libelled and yet the defender left in uncertainty under which of all the acts libelled on, The persewer intents the subsumption thereof and so in uncertainty altogether how to conceive this desense and if this be not

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maxime vagari cum maximo aliena vitæ et fortunarum periculo It is hoped as it will be found very evident so it was never the practise heretofore used in criminall libels, and which that it should not be now sustained is of universal concernment, and if sustain'd might prove of very dangerous consequence, and the libell as it is now conceived is in apt and the defender ought to be assoyled therfrom.

BEfore the defender come to his particular answer to the several articles of the ditay to the effect, the defender his case in his accession to the publike actings of this kingdome during the unhappy troubles till the treaty at *Breda* and his Majestys home-coming may be truly stated, It is humbly craved that the commissioners grace and honourable estates of *Parliament* may be pleased to remember that the *Kirk* and whole body of this Kingdome entred at first in the nationall covenant for defence of religion and his Majestys person and authority, and mutuall defence one of another in maintaining the same, wherein and in what followed in prosecution thereof till the treaty with his late majesty, and act of oblivion set dwon at length and ratified in the 6 act of the 2 *Paliament* anno 1641. His late Majesty did so far acknowledge and approve their loyalty that in the seventh article of the said large treaty his Majesty was pleased to appoint that at the close of that traty their said loyalty should he made known at the time of publick thansgiving in all places, particularly in the *Parish churches* of his Majestyes dominions. And in the said act of pacification and oblivion is pleased to declare that their constant loyalty in their intentions and proceedings should not be hereafter called in question, and that whatsoever fell forth in those tumultuous times, whether prejudicall to his Majestyes honour and authority to the Laws and liberty of the Church, or the particular interest of the subject, might be buried in perpetuall oblivion; and whatever had ensewed thereon, no mention should be made thereof, in judgement or outwith, like as his Majesty for himselfe and his successors promises in

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verbo principis never to come in contrary of the ſaid ſtatute nor any thing therein conteined but to hold the ſame firme and ſtable and to cauſe it be truly obſerved and theſe preſents to have the full force and ſtrength of a perfect and true ſecurity, like as thereafter in anno. 1643. The league and covenant was entred in with the two houſes of *Parliament* upon the ground of the large treaty by the church and whole body of this Kingdome, proporting the ſame ends of the covenant for maintenance of religion King & Kingdome; which was thereafter approved by the *Parlia.* 1644. And fift act thereof. and proſecute by wars both within and without the Kingdome by the authority of divers ſucceding *Parliaments*, Church and ſtate going unanimouſly along together without any apparent publicke difference till the year 1648. And even then that *Parliament.* 1648. ſo highly homologate the ſaid league and covenant, that they declare the breaches thereof to be the grounds of their reſolutions of that Warre, act. 4. 7. and 8. And their deſires for preventing thereof to be the fulfilling of the ſame *Ibidem.* The neceſſary qualification required in all with whom they would joyne either in their armies or committies is that they be ſuch who were of known faithfullneſſe to the cauſe and covenant in the ſaid act 7. and that they would oppoſe and endeavour to ſuppreſſe the enemies to the cauſe and covenant on hands all *Ibidem.* Witneſſing to the world that they ſwerved not from the principles conteined in the nationall covenant, and league and covenant, and that they reſolved cloſly and conſtantly to adhere thereunto and to all the ends thereof. So that at that time there was ſtill no difference as to the cauſe and covenant, any difference being only in the manner and not in the matter of that engagement.

Thereafter what ſtraits this poor Kingdome was redacted to be the defeat of that engagement, and how unable it was to make reſiſtance to that *Engliſh* army who in proſecution of their victory came to the borders & entred the ſame is notore to all, wherewith the whole Kingdome being ſur prized-

prizedwith amazement, and in evident hazard it was hard in that juncture of affairs to resolve upon any course for preventing the same, or rather incumbate hazard of the Kingdome. Whereupon a *quorum* of the committed of estates appoynted by the said *Parliament* 1648 were necessitated to take upon them the managing of affairs, and to see for conditions of peace, not being able to resist by force (the flowre and strength of the *Nation* beingbroke by the said defeat) and to accept the same upon the easiest termes that could be had for the time, which as it was endeavoured upon no other intention, or for any other end, but that which they were constrained to by inevitable necessity. So at that time it was generally lookt upon as good service, and which at that time was most necessary to evite very great, and otherwise inevitable evils being either necessitat'd to condesend to their demands at that time, or otherwise to have delivered the persons of all that did prosecute the said engagements according to the obleasment of the large treaty together with the forts and strength, of the Kingdome. The succeeding *Parliament* for the time in the year 1649. after Proclamation of his present Majesty did send commissioners to *Holland*, and afterwwds according to his Majestys desire to *Breda* where there was a treaty concluded by his sacred Majesty. Wherein he was graciously pleased to approve of the said *Parliament* in anno. 1644. and remannet *Parliaments* and their proceedings from the year 1641 preceding the said treaty which was thereafter ratified by his sacred Majesty and his *Parliament* at *Pearth* and *Starlin* and after the royall example of his ever glorious father an act of oblivion was indulged whereby all that might be ground of question was buried in oblivione and pardoned by a general act of oblivion in a most full and ample form.

This being the state of publick affairs during the time foresaid, albeit by the first ten articles of the dittay. The deffender is charged with deeds and publick actings coming within the compass of the said approbation and oblivion

foreſaid, yet ſuch firme relyance hath he of his Majeſty preſiſting in his gracious clemency) which does in his royall heart ſo much abound) That albeit his Majeſty by his Proclamation, *Dadet* the 12. of *October* 1660. *Is* pleaſed graciouſly to declare that he has remitted to his *Parliament* the tryall of the carriage of his ſubjects in *Scotland* during the late troubles; That the late troubles has only reſpect to the tyme during the uſurpers poſſeſſion and that tryall ſhould be taken during that time of the ſubjects carriage. The defender in all humility conceiving that it is no wayes to be ſuppoſed that his gracious Majeſty did therebey intend to rip up or revive, or to inſtitute any new tryall of old offences forgotten and forgiven as ſaid is eſpecially, ſeeing it is not to be ſuppoſed that the bowells of his mercyes ſhould be ſo ſtraitned to this his ancient Kingdome, to which he has upon all occaſions given ſo many ſignall and recent teſtimonies of his ſuperabundant favour then they are, and have been to his Subjects of his other dominions, to whom according to his Majeſties declarations, he hath granted a full and free pardon, from which few, and theſe only the unpardonable murderers of his royal father are excluded; for whom, or any guilty thereof, no puniſhment can be ſufficient, and therefore the defender in all humility conceives the ſaid articles, though libelled, are not to be inſiſted on.

The ſolemnity of the oaths both of Covenant and League, will be as the defender hopes, pregnant preſumptions to put and end all controverſie, anent the ſincerity of his (as of the Church and Kingdome) their loyal intentions for the maintenance of the perſon and authority of our dread Soveraign whereunto they were thereby ſo religiouſly ingaged, and the conſtant tenor of his acting ſtill by vertue of publick Orders and Warrants of Parliament, and their committees wherein his faithfulneſs in the execution was alſo in the like manner approved (will witneſs, that what he did was not for any private intereſt, but for the publich ends whereunto he conceived himſelf ingaged in manner foreſaid, nor was the Defender for continuing of theſe

theſe unnatural civill diſcords as he did witneſſe by his inclination to unaccommodation with *Montroſs* in the year 1645. mentioned after in anſwer to the tenth article, which albeit fully agreed to betwixt him and the defender, yet he could not obtain the commitees approbation thereof, which is in evidence, that the defender had not the chief ſway of affaires and was alwayes inclinable to peace (religion being ſecured) like as the carrying on the ingagement in the year 1648. though the defender differed in his judgement as to the way and manner upon the grounds and reaſons, thereafter expreſt in anſwer to the ninth Articles) does clearly evince that he had not the chief ſway in publict actings, and what power and intereſt he had in the year 1649. he did faithfully according to his bond duty improve the ſame for removing theſe differences betwixt his Majeſty and his ſubjects, wherein he was pationately earneſt as ſhall be made appear in anſwer to the ſaid tenth article and after his Majeſties hom-coming and during his being in this Kingdom, and thereafter till the enemy had fully prevailed and that by his articles of agreement he was there priſoner he faithfully ſerved his majeſty, and even during his Majeſtyes abſence, did alwayes and ſtill ſhall return loyall duty and good affection to his perſon, government and poſterity.

And what ever theſe who are grown up may judge, who only ſee the unhappy and accidentall events that are the effects of the corruption of men, but have not known the counſells and cauſes which are the two parts of theſe things neceſſary to be known to all who would judge of human actions arright events being for the moſt part uncertain and the worſt of events of tyms thorow the corruption of agents or others extrinſecal circumſtances following upon the beſt of actions, yet had they been intimately acquainted with the grounds and cauſes & nature of the actings while a doing, the defender is confident that they would have concurred and been of the ſame judgment as being clear, that theſe proceedings had no native connexition with the ſad and unexpected conſequences that has enſewed

And now to come to the particular defences to the ſeveral points of the ſubſumption of the Dittay; And firſt as to the firſt article of the ſubſumption, annent the words alledged ſpoken at the *Ford* of *Lyon* which are lybelled to have been: That it was the opinion and judgement of many Lawyers and Divines, that a King might be depoſit for deſertion, vendition or invaſion, and which is alledged to have been meaned by the pannel of the then Kings Majeſty, and the preſumptions adducit for inforcing that to have been the defenders meaning, are ſome words allegit ſubjoyned, to wit, Mr. *John you underſtand Latin.* It is alledgit for the defender (no wayes acknowledging to the beſt of his memory, that he uttered any ſuch words) 1. all criminal dittayes ſhould contain in them at leaſt year, moneth and place, otherwiſe they are inept, *Bartol & D.D. ad L. libellorum ff. de Accuſatione*, becauſe amongſt other reaſons, *diverſitas loci varia argueret facinora*, ſaith *Battand: Reg. 6. prax. cum poſt angel*, &c. But ſo it is, there is no moneth condeſcended on when the defender ſhould have ſpoken theſe words, and therefore the dittay in this article is inept. 2. There is no particular act of Parliament in the act libellit upon in the propoſition condeſcendit, on which is contravened by the words libellit, therefore the libel in this article of the ſubſumption, is general and obſcure, and till the particular Law contravened be condeſcendit, one can receive no anſwer. 3. The ſpeaches as they are libellit, falls not under the compaſs of the acts libellit on in the propoſition of the lybel, to infer any of the pains therein contained, becauſe they are but libellit, as the narration of the opinion of others, which is not relevant to infer ſo much, that the Narrator is of the ſame opinion, except it were alſo libellit that he did declare his homologation, and that he was of the ſame judgement, which neither is, nor can be libellit far les, then is it relevant to infer a crime, and ſo high a crime as Treaſon; for ſuppone the defender had ſaid, That they are very learned both Divines and Lawyers, whoſe opinion it is, that the Pope is the head of the Church, and that

he

he has power to dispense with the article of faith, to depose Kings (a horrid opinion) &c. and that it is their opinion also we may merit heaven by good works, and that all Hugonites or Protestants are damnable hereticks, and that he had related their words in latin, as the latin of of that verse of the gloss of the common Law, *cap. sicut de excess. prælat.*

Restituit papa salus deponit, &c.
articulus solvit.

And had said to Mr. *John Stewart* thereupon, Mr. *John* you understand Latin, albeit these opinions of these Divines and Lawyers be execrably Heretick, yet no body will say, that the defenders relation of him, would have inferred him to have been guilty of the same; No more in our case can the relation libellit infer him to have been of that opinion with these Divines and Lawyers, or in any way thereby to have contravened any act of Parliament libelled. 2. The foresaid opinion is libellit only to have been related *in abstracto*, (nothing of our Kings Majesty who then was) And whereas it is libellit, that it appears the sence and meaning thereof appeared to have been of the then Kings Majesty, in so far, as the defender subjoyned to Mr. *John Stewart*, the words aforesaid, that he understood latin. 1. The libel in this part is ambiguous for this may be interpret, either that it was the meaning of the opinion of these Divines which he related, (this seems to be most consonant to the words) or els that his own meaning was, That it was the judgement that the then Kings Majesty our Soveraign might be so dealt with, as is libelled in the latter part of his article, and so the Article in this part thereof is ambiguous and inept, and there ought to be no process thereupon. *Nam Libellus (in criminalibus præsertim) nihil ambiguitatis vel obscuritatis continere debet per cap. Constitut. 6. extr. derig. don. Bot.* 2. If it be understood in the former sence, it is but still relative of the opinion others; and if in this latter sence, to wit,

that

that it was his own judgement, the presumption libelled of what he spake to Mr. *John Stewart*, is no way relevant to infer it. 1. Because they held a more obvious meaning, *viz.* That it might have been the opinion of these Divines and Lawyers was related in latin, and indeed *Grotius* and *Berclaius*, who write of that Subject, are both in latin, and that he had subjoyned to Mr. *John Stewart*, Mr. *John* ye understand latin. 2. That such opinions being rather the fancy of notional School men, (otherwise not unlearned in their own art) or of such as are Doctors notionals in the Law, (if there be any of such opinions) rather then of solid jurisconsult, who for most do not so much as move these questions not to be moved. 3. If any such words had been spoken to Mr. *John Stewart*, They might have had this more proverbial sense. Some Lawyers and Divines are of that opinion, but the subtilty of these questions or opinions is latin to me, that is, I understand it not, as we say commonly of things we understand not, *It is latin to me.* But Mr. *John* ye are a Scholar, and ye understand it. Now it is a rule in Law, that where the meaning is doubtfull or obscure, that which is the most favourable sence should be followed. *L. 9. ff. de reg. juris and Matheus de afflictis decisione* 255. *n.* 68. 69. *& decif.* 307. *n.* 15. and when these words are ambiguous, The declaration of him who uttered them should be acquiesced unto; *Menochius consilio* 197. And the defender is ready to declare, that if ever he had spoken such words, he was very far from any such meaning, as is libelled against him. Nor 4. is it any way presumable that any rational man, who had the honour to know his late Majesty, could have made application of any of these three causes to so worthy and illustrious a Prince, seeing the said *Grotius*, *Berclay*, and others that writs upon that subject, acknowledges yea it is obvious to common sense, that hardly can they fall out in the worst of Princes, if he be but *compos mentis*: and as to the presumption that follows, that the defender meaned by the late Kings Majesty, because the condition wherein the kingdom was for the time. 1. It is far more presumable

that

that the kingdom was in such a condition of affection to his Majesties sacred person, and authority at that time none durst have uttered what might reflect thereupon, seeing it is libellit to have been shortly after the subscribing of the Covenant, wherein they had solemly bound themselves by the oath of God to maintain his Majesties person and authority. 2. His Majesty by his royal judgement in the act of oblivion 1641. hes presumed the loyalty of his Subjects, both in their intentions and proceedings in these times, which is *presumptio juris, & de pre.* As for the defender, his prosecuting of Mr. *John Stewart.* 1. It was a judicial process and legal Act and so can be no imputation to him wherein the process was laid in so fair a course of Law, That he was condemned not only upon clar probation, but his own confession, and yet the words whereupon he was indyted and convict, were far different from these words, as they are here libelled, otherwise the defender would never have pursued it.

Ultimo adhering alwayes to the alledgance above propounded humbly protesting, that they may be first discust, and whereupon it is craved, he may be assoyled *in hoc libello*, because by act of Parliament in *anno* 1641. amongst the imprinted act, *anno* 70. The same service is appoved and he exonered. It is alledged, that the defender ought to be assoyled from the whole crimes in the first article because after the tyme libelled of the alledged committing of the same his late Majesty of gloriousmemory granted that never to be forgotten act of indemnity and oblivion in anno 1641. Which did proceed upon the preceeding treaty with his Majesty, and which is solemnly confirmed by his Majesty himselfe in person and his three estates in his *Parliament* 1641. 6. act thereof wherin his Majesty for himself and his successours does promise in *verbo principis* never to come in the contrary of that statute and sanction or any thing therein contained 2. But to hold the same in all points firme and stable, yea, and to cause it to be truly observed be all his Majesties leiges for ever hereupon the defender doth confidently rely for all that is libelled as committed

by him in this article, or any other preceeding that time, as being confident it is the greateſt imaginable ſecurity that he and the reſt of the leiges of the land who are conceived can have.

As to the ſecond article and haill head thereof 1. neither day, moneth, nor year of God are condiſcended on, and therefore ſo generall that is inept. *Nam generalitas parit obſcuritatem, Marent* part 6. ſpec. & de libel. oblat. *quomodo Concip. & per. textus ibi citatos.* 2. It is not condeſcended which of the acts of Parliament libelled this article and the ſeveral heads thereof contraveins, which is a generall ineptitude and nullity in this libel. 3. As to the firſt point; if that article annent the intaking of the houſe of *Airlie*, cuting and deſtroying the planting, and demoliſhing the houſes. 1. It is not relevantly libelled, in ſo far as it was libelled that the houſe was kept for his Majeſties ſervice, but doth not condeſcend that ſervice now. 2. Is it libelled that there was any in it that had a commiſſion from his *Majeſty*, without which it hes not any colour of relevance. 4. The defender never had any privat quarrel, nor perſonal prejudice againſt the noble Lord *James* Earl of *Airlie*. But if his marching to that houſe be meaned of that which was in *anno* 1640. it was by vertue of, and in obedience to a commiſſion put upon him by the Committe of Eſtates for the time, nor was the ſaid houſe at his arrival thereat kept for his *Majeſties* ſervice, as is (though wrongfully) libelled. But before that time was ſurrendred to the Earl of *Montros* who had put Colonel *Sibbald* to keep the ſame for the King and Countries uſe, and which Colonel *Sibbald* upon ſight of the defender his commiſſion, did abandon the ſaid houſe: and if there was any planting cut, it was alennerly ſome few ſhrubs and buſhes which the defender could not hinder) for hurting to the ſoldiery, and tho the defenders commiſſion bare power and warrant to demoliſh the houſe he was ſo far from ſtretching, or fully executing the ſame, that he did not only ſlight the houſe, and delayed a long time to do the ſame, in expectation that the Lord *Ogilby* ſhould have

have procured a countermand from the committee, and did ſlight it till he was paſt all hope of obtaining the ſame; not, as is hoped will be acknowledged by the ſaid Noble *Earl*, neither did, ſo far as the defender knew or could hinder, the *Earle*, his friends and followers ſuſtaine any other prejudice then what was uſuall, and what all places are ordinanarily obnoxions to where armies or parties of ſouldiers come but however it is not relevant, as ſaid is.

Tertio, That part of the ſaid article, though it were true (as it is not) is no ways relevant to infer the concluſion of the dittay, here being no law nor ſtatute libellit on, that for cutting of timber or demoliſhing the houſes of private perſons (though done upon private quarrels, as this was not) inferres the pain of treaſon.

As to that part of the article annent the burning of the houſe of *Forther* beſide the exceptions againſt both the points therof alledgit before in the beginning, it is not relevant to ſay that the defender ſeiſed there upon to infer any crime except it were libelled he ſeiſed by force, for he might have entred *in vacuam poſſeſſionem*. 2. *Non relevat* to libell that thoſe under him did ſeiſe thereupon or raiſe fire therein, except it were libelled that the defender had given expreſſe order or wantrand to raiſe that wilfull fire: who as he gave not order therefore, ſo he was not preſent nor near the place, nor knew any thing thereof till after the houſe was burnt & *noxia caput ſequitur*. 3. In the acts of *Parliament* libelliton annent burning and wilfull fire-raiſing, the ſame can only be underſtood of burning and raiſing of fire on private feuds, and for particular revenge in time of peace, and is not to be extendit to ſuch deeds done in the heat and fury of wars, ſeeing *inter arma ſilent leges*.

And as to the aggravation of the defenders hatred againſt the *Earl* meerly for his loyalty to his Majeſty, it is *gratis dictum* & againſt that preſumption *qua unuſquiſq; præſumitur bonus* and againſt that loyalty to his Majeſty, that is hoped ſhall more and more appear in the defender.

Laſtly the defender ought to be aſſoyled from the ſaid article and all deeds therein mentionat. Becauſe the ſame precedit the act of oblivion in anno. 1641. whereby all things that did fall forth in theſe tumultuous times whether prejudiciall to his Majeſtys (honour and ſafety) or to the lawes and practiſes of the Church and Kingdome or to the particular intereſts of the ſubject buried in perpetuall oblivion as more fully is conteined in the ſaid act.

3. As to the third article annent the beſeiging of dumbration Caſtle and traſporting *Cannon* and *ammunition* out thereof.

It is alledged for the defender (10) that the aſſaulting of the ſaid Caſtle is not relevant to inferre the concluſion of the dittay becauſe as is before alledged none can be declared triators but theſe who hes contraven'd a ſpecial act made under the pain of treaſon. But ſo it is that none of the particular acts of *Parliament* whereupon the propoſition is founded, mentions any thing againſt theſe who aſſaults the Kings Caſtle nor does any of them infer the pain of treaſon therefore. But only the 25 act of *Parliament* 6. *Jac.* 6. intituled ſundry poynts of treaſon by the which acts they only are to be puniſhed as traytors who aſſaults the caſtle or places where the Kings perſon is and that without warant of Eſtates, but it is neither libelled, nor was the Kings perſon in the ſaid Caſtle the time of the alledged aſſaults thereof, nor did the defender aſſault and lay ſiege to the ſame without warrand from the eſtates, but by their expreſſe order & commiſſion and the truth is the defender himſelfe did not appear before the ſaid houſe till the ſaid Sir John *Henriſon* being ſtraitned with the ſeige ſent for the defender & offered to ſurrender the houſe upon honorable conditions which the defender ſuffered him to make himſelf and which were accordingly kept not without ſome difficulty the inhabitans of the town by reaſon of prejudice done to them being highly inſenced againſt the ſaid Collonel. As

As to that part of the ſaid article annent the tranſporting of the Kings *Cannon* and ammunition none relevat to infer the concluſion none of the facts libelled on concluding againſt any ſuch fact the ſaid crime of treaſon and the truth is the defender did never tranſport any *Cannon* or *ammunition* out off the ſaid Caſtle but two *Cannons* which the duke, of Richmont heritable keeper thereof gifted to the defender and which he would never have gifted if they had not been his own, and not the Kings 2. The defender ought to be aſſoyled from the ſaid article & all deeds therin contained the ſame having alſo proceeded the ſaid act of oblivion in *anno.* 1641.

4. And as to the fourth article of the dittay anent the defenders calling or cauſing to be called a convention of the eſtates in *anno* 1643 entring in league with his Majeſties enemies impoſing exciſe and ſubſidies on the Kingdomes raiſing an army entring *England* therewith fighting for and with the rebells there, It is anſwered that the whole points of this article of the ditty are charged perſonally on the defender ſo contrary to the notority of the matter of the fact known to both Kingdomes and to his Majeſtyes commiſſioners grace and to the whol: Parliament yea to the fifth act of *Parliament*, 1644, relating and approving all the acts that are made points of this article, That there needs no more but propond as known to all, and to repeit out of the ſaid publick law and act of *Parliament* what is there in libelled to evince that they are not the defenders perſonal deeds: but the comittees (comiſſioners eſtabliſht by his Maſty) convention of eſtates and of the whole Church and Kingdom of *Scotland* and approven by that *Parliament* 1644. in the ſaid 5. act. thereof firſt then as it is noture ſo it is clear by that act that the ſaid convention of Eſtates was called not by the defender as it is libellit, but by his Majeſty privy Counſel Commiſſioners for conſerving the articles of the Treaty therein mentioned, and Commiſſioners of common burdens all eſtabliſht by his Majeſties authority in *anno* 1641. which Conſervators concerning that arti-

sle in the large Treaty, bearing the Kingdom of *Scotland* their desire for unity in religion, and conformity in Church-Government, as a special means for conserving of peace betwixt the two Kingdomes. In answer thereto, His Majesty with advice of both houses of Parliament in *England* doth declare his approbation of their affection in their desire of having conformity of Church-Government between the Nations, and as the Parliament had already taken to consideration the reformation of Church Government, so they would proceed therein in due time, and this was one of the main grounds whereupon both houses entred the said League. 2. That the enacting and entring the League and Covenant, was an act of that convention of Estates, not the defenders personal act. 3. That the League and Covenant was entred in with the two houses of the long Parliament, and assistance given to them in fighting with or for their army, or otherwise, which is libelled fighting with rebels. The point of fact being thus cleared in opposition to the dittay. 2. It is alledged, that the first two members of this article is subsumed under none of the acts of Parliament libelled on in the propositon, there being no act of Parliament libelled against meetings, bands or leagues in general, or in special betwixt the two Nations or Estates thereof. 3. As to the remanent members of the article, they can no wayes be relevant (with all submission) except it were qualified, that the two houses of the long Parliament to whom the assistance libelled was given, that they were enemies and rebels, but that the defender is confident it will not be said, because by his Majesties act of Oblivion 25. *April* 1660. his Majesty after his happy restitution, declares that what was acted even against his Majesty, and his royal Father, by his Subjects in *England* during these times, thereafter shall not be called in question at all, so much as to the prejudice of their reputation, in manner at length conteined in that gracious act, and how loyal the long Parliament was; did appear in that the usurper durst never attempt any thing against his late Majesties person, till they were broken, as

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alſo what loyalty the ſecluded Members of that Parliament has (as became them) ſhewed to his Majeſty in his juſt and glorious reſtitution, is known to all *Europe* to their eternal commendation and renown. No doubt as from conſcience of their oath of duty and allegiance, ſo of the oath of God whereunto they bound themſelves to maintain his Majeſties perſon, authority and greatneſs, as well as religion in that Covenant. 4. All the foreſaid deeds which are the members of this article, *viz.* The calling the foreſaid convention of Eſtates as being the act of the foreſaid Council and Commiſſioners, the entring in the League and Covenant; raiſing of the army for aſſiſting the two houſes of Parliament of *England*, impoſing exciſe, *&c.* as all being acts of the ſaid Convention of Eſtates, together with the ſame Convention of Eſtates are all approven by the ſaid 5 act Parl. 16, 4. In reſpect whereof the Defender ought to be aſſoyled from this whole article, and all the crimes contained therein. 5. Not only is the ſaid calling of the ſaid convention of Eſtates, and the ſaid convention entring in the League and Covenant, impoſing of exciſe, raiſing of forces for the Parliament of *England*, and remanent acts of the ſaid Convention approven by the ſaid 5. act of Parl. 1644. But by his Majeſties Treaty at *Breda*, and the act of Oblivion in the Parl. holden at *St. Jonſton* and *Sterlin* in *anno* 1650 and 1651. or either of them, all things done during theſe tumultuous times intervening betwixt the ſaid act of oblivion 1641. and his Majeſties home-coming 1650. Whether prejudicial to his Majeſties honour and authority, or to the Laws and liberties of the Church and Kingdom, or to the particular intereſt of the ſubject are buried in perpetual oblivion. And by the ſaid Treaty, and act of ratification of the ſaid Parliament, or, one or other of them the ſaid Parliament 1644. and all acts thereof are ratified, and ſo amongſt the reſt, this which is the 5. act, which approves all the acts, thereupon this fourth article of the Dittay is founded, and therefore the Defender ought to be aſſoyled therefra.

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As to the fifth article anent the burning of the houſe of *Menſtrie* in *anno* 1645. The defender is ſo innocent thereof, that if it were libellit relevantly, he needed no other defence but a ſimple denyal, but the truth is, that it hath been burnt by ſome of the ſoldiers, commanded by General Major *Bailie*, for the time upon the greateſt provocations that could be, two peroches, *viz. Muckart* and *Doller*, having been burnt the night before, and ſeverals, both men, women and children cruelly killed by the concurſe of theſe that were in that houſe, but it is no way relevantly libellit, in ſo far, as it is libelled, That the Defender or others under his command burnt it. 1. Becauſe there is no act of Parliament of all the acts libellit upon in the propoſition whereupon this can be ſubſumed eſpecially the acts anent the raiſing of fire, upon which (if upon any) it ſeems it is particularly founded, there is no ſuch odd extenſion of that ſo high a crime, as to make any guilty of it, by committing of it by others, who are under their command, and this were a very univerſal, terrible concernment, and in the preſent caſe were moſt dangerous and unjuſt that a Commander ſhould be holden to anſwer for all the illegall deeds done by his ſoldiers. 2. It is againſt common reaſon, the common Law, by which this therefore is well eſtabliſhed, that *delicta proprios tenent authores, & noxa caput ſequitur*, and therefore it is not relevant that the defender burnt it by himſelf or others by his ſpecial direction or particular order for that effect.

2. Though it were made relevant in manner foreſaid, yet the dittay is inept as to this Article, and the defender ought yet to be aſſoyled therefra, becauſe the year of God is only libelled, to wit, the year 1645. whereas not only the moneth, as in all criminal libels *per L. libellorum ff. de accuſationibus*, and the Doctors treating thereupon. But the very day ought to be condeſcendit on for the omiſſion of the day prejudges the defender of his defence, *Specially* of his *alibi*, which he might and would propone, if the day were condeſeneded on; that being required, the day ought to be condeſcended on, otherwiſe the libel is inept, *Nam*

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Libellus debet continere non tantum annum & menſem, ſed & diem ſi reus id requiſierit cum probaturus ſuum alibi Dam. hand. cap. 3. num. 4. 5. *& battander Reg. 6. num. 4. Maranta in ſpec. del. bel. Obl. 3. num. 12. per bark. in L. Si quis reus Colum 3. in fin. de publ. judic. & jaſon. in L. Ubitraria 2. ſect. Si quis exhiſi ff. de eo quod Crito loco.* But ſo it is as that if the day were condeſcended on of the ſaid burning, the Defender might, and if need were, would offer to prove that he was that day during all the time of the burning *alibi* at a codſiderable diſtance fra the ſame place.

3. *Abſolviter Becauſe* Leivtenant General *Bailzie* at that time when the houſe was burnt, had the Command of the ſaid forces (adhering alwayes to the former defences againſt the aptitude and relevancy of this part of the dittay, & expreſſing the ſame that may be diſcuſt *ante omnia*) In reſpect whereof the defender ought to be aſſoilzed *ab hoc libello* at leaſt there can be no proceſs upon that part of the dittay, as it is now libelled. 4. Albeit the defender had burnt, or given direction only to burn the ſaid houſe, as he has not yet by ſpecial act and commiſſion of Leiutennendry granted to him by the Parliament 1644. He was impowered to perſew the Mc. *Donalds*, and their adherents, and acceſſories with all kind of hoſtiliry, by fire and ſword, with a diſpenſation with ſlaughter, Mutilations, raiſings of fire, aſſailing of houſes, taking of priſoners, and other inconvenments whatſoever, that ſhould fall out in the execution of that Commiſſion in perſuing of them, as the ſaid act and commiſſion may at length bear, and which commiſſion is ratified by his Majeſty in the Treaty at *Breda*, in his ratification of that Seſſion of Parliament 1644. among the other Parliaments and Seſſions thereof ratified by his Majeſty: all after 1441. and preceeding his return but ſo it is That the ſaid Mr. *Donald* were at that time, at the burning of the ſaid, houſe joyned with *Montroiſs* and it was in purſuance of both that the ſaid houſe was burnt as

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is noture (and if need be, The defender will offer him to prove) and therefore though he had burnt or given direction for the burning thereof he ought to be assoiled.

5. By act of *Parliament*. 30 act 22. *March*. 1647. it is statute and ordained that all his Majestys good subjects shall be altogether freed and liberate in all time coming from being any wayes called, convened, pursued, troubled or molested in judgment civill or criminall or outwith the same for any deed done or to be done by them against the persons, lands or goods of such as have or shall be in the rebellion (by which it is noture, that the said armed opposition made by the deceased Marquess of *Montrose*, and the said Mc. *Donald*, and others under his command; to the Estates is understood) during the time of their being in the said rebellion, or have been, or shall be guilty with the rebels in their wicked courses, or of any of them, who came under the first or second Classes of delinquents contained in the 5 act of the fifth session of that Parliament holden at St. *Andrews*, in the moneth of *Jan*. 1646. But so it is, the Defender offers to prove, if need be, That a son of the Earl of *Sterlings* named *Charles* or *John Alexander*, who had, or either of them had right to *Menstre* had joyned with *Montrose* and those under him, and so came under the second Class of the said fifth act of the fifth session, Parliament 1646. Or at least, went or sent into their ligor, or without compulsion entertained them in the said house, and therefore the defender ought not to be pursued, even though he had burnt, or given direction to burn the said house (as he in no wayes did) and being pursued, ought to be assoiled from this article like as it is conjunctim alledged for the defender in fortification of the said act, That the same is ratified by his Majesties large Treaty at *Breda*, as being one of the acts of that session of Parliament 1647. which amongst the other sessions of Parliament, and acts thereof since the year 1641. and preceding his Majesties return in *an-*

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no 1650. are ratified by the ſaid Treaty, as alſo by the act of Ratification at St. *Johnſtones* or *Sterling* in *annis* 1650 & 1651. By which ratification (or ratification of his Majeſty by the Treaty aforeſaid,) the ſaid act of Parliament 30. in *anno* 1647. comes (as a moſt ſolemn remiſſion granted by his Majeſty, and whole Eſtates of Parliament to the perſons therein contained) and ſo like as if every one of them had got a particular remiſſion ſo ſolemn: It had been an uncontrovertable remiſſion for what were therein contained, ſo muſt it now be, being in effect of the ſame nature and vertue, albeit many be included in one.

6. By the act of Oblivion at St. *Johnſtones* or *Sterling*, in the year 1650, or 1651. all acts of hoſtility whether between the King and his Subject, or between Subject and Subject, and what things fell out in theſe times betwixt the year 1641. and his *Majeſties* return, whether prejudicial to his Majeſties honour and authority, or to the Laws of the Kingdome, or the particular intereſt of his Subjects, are buried in oblivion. In reſpect whereof though the defender were acceſſory to the ſaid burning, as he is not, yet he ought to be aſſoiled.

As to the ſixth article, anent the taking of the houſe of *Towart* belonging to the Laird of *Lamont*, and the houſe of *Oſcog* belonging to *Oſcog*, and after articles of capitulation drawn & ſubſcribed by *Ardkinglas*, and under his command others under Truſt and aſſurance, murdring a great many of *Lamonts* and *Oſcogs* friends. As this is no wayes true (the defender being altogether innocent thereof) ſo is it no wayes relevantly libelled. For 1. Neither day nor moneth of theſe deeds are condeſcended on. 2. The alter-

nity by others under his Command not relevan ro inferre a crime, far les Treason against the defender for the reason contained in the first answer to the former article, *viz.* That there is neither act of Parliament lybelled, nor common law ordaining a man be lyable to a pain far les the highest of pains, for deeds or crimes by those under his command, except he gave them special direction: But every one is to suffer for his own fault, as at more length is contained in the said answer, which is here repeated. 3. Non relevat, These for whom he is answerable for the same reasons, because every one is answerable for his own fault and crime. 4. *Non relevat.* That others whom he might stop, did it, because there is neither any act of Parliament lybelled on, ordaining any to be answerable for all deeds of those whom he might stop (specially the act against Murder under Trust bearing no such thing) Nor is there any Law nor reason for the same, but *delicta proprios tenent authores*, as hath been said, and no wayes granting the defender could have stopped them, for the truth is, he could not, and was not near them when what is libelled was done, and albeit indeed, it be *contra officium charitatis*, not to stop any doing a mischief, if one may safely do it, yet that it comes under the compass of Law to inferre a crime, especially Treason cannot be affirmed. 5. Taking of the house of *Towart* and *Escog*, is not subsumed upon any of the acts of Parliament lybelled, there being none of them anent the taking in of houses belonging to the leiges, and so is not relevant to infer any of the crimes contained therein. 6. The alledged killing a great many of *Lawmonts* and *Oscoges* friends after the assurance given by *Ardkinglas*, is no wayes relevantly libelled to infer the crime of slaughter under trust, because by the act of Parliament, *Jac. 6. par. 11.*

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cap. 51. of ſlaughter under truſt, upon the which it is founded, ſlaughter under truſt is only when the party ſlain is under the truſt and aſſurance of the ſlayer, which is no way here lybelled, but that the perſons who are lybelled to have been ſlain by the defender, were under the truſt of another, to wit, *Ardkinglas*, who if he or any other under the defenders command have done any thing againſt their own aſſurance, they are to anſwer for it.

7. The defender adhering to their defences, and craving that they being againſt the relevancy be firſt diſcuſt, repeats his former anſwer founded upon his commiſſion of Leiutennendry therein mentioned, for they who are deſigned *Lawmont* and *Eſcoges* friends, were the *Mac Donalds*, or their Adherents and Acceſſories (as is notore, and the defender if need ſhall be, offers to prove it) whom by the foreſaid Commiſſion he had power to proſecute with fire and ſword, with diſpenſation of ſlaughter, and raiſings of fire in manner at length contained in the Commiſſion, which amongſt the other acts of Parl. 1644. is ratified by his Majeſty in his Treaty at *Breda*, as is alledged in the ſaid anſwer which is holden herein repeated, and therefore the defender ought to be aſſoiled from this article, and truly what cruelty was exerciſed, was by the Lord of *Lawmont* himſelf againſt the Heretors and other inhabitants in the Shrievdome of *Argyll*, for the which upon a ſupplication given into the Kings Majeſty and Committee of Eſtates at *Sterling* in *Auguſt* 1651. He was impriſoned within the Caſtle of *Sterling*, till after tryal Juſtice ſhould have been done upon him, but was releaſed by the *Engliſh* when they took the Caſtle with the other priſoners, however the defender is confident, as it is known, ſo he ſhall make it appear, if need be in the other proceſs whereunto this relates, and wherein it will be moe pertinent,

and yet the day and time of the committing of the deeds mentioned in this article being condescended on as it ought to be when required by the defender, that he may propone his *alibi*, he offers to prove if need be, That he was *alibi* the time of the committing of the said deeds, at a very great distance, to wit, in *England*, like as his Majesty by his Treaty at *Breda*, hath ratified and approved the acts of Parliament, and his Majesty, and Estates of Parliament, hath ratified the said Treaty, and past an act of Oblivion of all former deeds done by the Subjects, which secures and indemnifies them for any former actings, in respect whereof he ought to be assoiled.

As to the seventh article made up of several members or parts, as 1. anent the men alledged murthered at *Lockhead* and *Dunnavertie*. 2. Anent the aggravation added thereto. Anent an old man begging his sons life and denyed him. 3. Anent the sending 200. men from *Illa* to starve in *Jura*. 4. Anent the taking of the person of Col. *Kittoch*, out of a ship in *Leith* Rode, wherein it is libelled, that he had been brought by order of Parliament.

It is alledged against the seventh article, That 1. The first part thereof (anent the men alledged murthered at *Lockhead* and *Dinnavertie*) is no wayes relevant, not only in respect that the particular moneth and dayes whereupon the same should have been done, are not condescended upon, but also in respect there is not one particular person by name and surname whereby he might be known condescended upon, against whom the deeds libelled should have been committed, without the which this part of the article cannot be sustained as relevant, it being contrary to all Law and practise, that murther in the general without nameing the persons murdered should be sustained as relevant Dittay against any. 2. The slaughter alledge[a]

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committed upon theſe in the houſe of *Lockhead*, is not relevantlie ſubſumed upon the acts of Parliament lybelled, in ſo far, as there is no aſſurance lybelled to have been given to them, to bring it under the act of murder under truſt, and there is no other act lybelled under which it can fall. 3. It is alledged, That the defender cannot be charged with any of the deeds lybelled in the ſaid firſt part of the article (though they were true and relevantly lybelled, as they are not) becauſe the expedition made againſt the rebels in *Kintyre* in the year 1.belled, was by *David Leſly*, and theſe under his command, againſt ſuch, who contrary to his Majeſties order ſent to them at that time, commanding them to lay downe armes, and contrary to their own engagements, not to joyn with *Aliſter*, *Mac-Donald* did notwithſtanding continue in armes and rebelliouſly (as was then declared by the Eſtates of Parliament) reſiſted *David Leſlie* in the execution of his ſaid Commiſſion againſt them, who therefore after defeating of them in the field, took them out of the ſaid houſes of *Lockhead* and *Dunnavertie* without any capitulation, and diſpoſed of them as the Counſel of Warre then preſent with him thought fit (which is noture, and the defender offers to prove, if need be) for which, and other his ſervices, the ſaid *David Leſly* got the Parliaments approbation in *anno* 1648. as the ſaid approbation and exoneration bears, which will clearly prove any thing that is herein alledged, and therefore the defender, nor any in his company at that time cannot be charged with any deeds lybelled in the firſt part of this article, but ought to be aſſoiled therefra. 4. The defender repeats his third defence made to the fifth article founded upon his Commiſſion of Leivtennendry, the perſons mentioned

ed in this article againſt whom the deeds are lybelled, to have been committed, having been the Mac. *Donalds* or the Adherents and Acceſſories which is noture, (and the defender offers to prove, if need be) to proſecute whom he had the Commiſſion containing diſpenſation, and which was ratified in manner mentioned in the ſaid anſwer, like as he repeats the 4 & 5 anſwer made to the ſaid article, in reſpect whereof he ought to be aſſoilied therefra.

It is alledged againſt the 2, 3 and 4 members of this 7 article, that they are no wayes ſubſumed, nor cannot be ſubſumed under any of the acts of Parliament lybelled, and therefore the dittay herein is inept, and the defender ought to be aſſoiled therefra, (and yet in point of fact they are but meer Calumnies) As to the ſecond part (anent the ſaid old man and his ſon) it is no wayes relevant, not condeſcending on the perſons names, and therefore can receive no other anſwer, but that it is a meer fiction to make the defender more odious, who ingenuouſly profeſſes, that he never heard of ſuch a thing, till he ſaw it in the libel. The third part of this article hath no better ground than the ſecond, and the defender deſires, that for clearing his innocency of the fact lybelled therein (anent the ſending of two hundred men from *Ila* to ſtarve in *Jura*) that the Gentlemen in the ſaid Iſles may be examined upon the truth of the matter. It is alledged that the fourth part of this article, anent *CoilKittoch*.

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¶ 7. Is of the ſame nature with the former two, and therefore the ſimple relation of the truth is ſufficient to refute the falſhood thereof, which is ſhortly this, *viz.* That *Coil Kittoch* was not brought to *Leith* either by order of the Committe of Eſtates or Parliament, but being taken priſoner in *Ila* by the forces under the command of *David Leſly*, and delivered to the defender, the defender put him aboard in Captain *Browns* ſhip who undertook to deliver him at Dunſtaffnage. But Captain Brown finding the opportunity of a fair wind to Leith, to which he intended, and not willing to loſe the ſame, did not go to *Dunſtaffnag*, but came ſtreight to Leith Road, and immediately gave the defender notice, that he had his priſoner aboard, whom therefore the defender received from him, and ſent him to *Dunſtaffnage*: and the defender deſires that Captain *Brown* who lives at *Weymes*, may be examined upon the truth of this matter, by whom he offers to prove this, if need were.

And whereas it is libelled that *Coil Kittoch* was hanged it is true, but it is alſo true that he was condemned to die in a juſtice or Lieſtenant court judicially which is notore. And the defender offers to prove, if need ſhall be, ſo that this can be a ground of no crime nor ditty what ſomever, but however the defender ought to be aſſoiled therefra.

¶ 8. To the firſt member of the eighth article bearing that notwithſtanding the manifold acts of dignity favour and honour conferred upon him by his then dread Soveraign his Majeſty being redacted to greater ſtraits by that army of *Sectaries*, and having caſt himſelf over in the hands of the army of his *Scots* ſubjects for ſhelter and preſervation of his royall perſon, Nevertheleſſe the ſaid *Marqueis* being chief ring-leader, of that factious

ctious party who then ſwayed the eſtate of affaires both in councell and army did ſo contrive and complot, and by his influence ſo prevail, that after all faire offers made by his Majeſty and his deſire to have come and lived in *Scotland* till all differences in both Kingdoms had been ſetled, an act of *Parliament* was made for abandoning his Majeſty to the mercy of his inveterate enemies, the ſaid army of *Sectaries*.

It is anſwered that as he muſt continually acknowledge the late King and his preſent Majeſties acts of favour, honour and truſt: ſo muſt he ſtill deny (as he ſafly may in the preſence of God who is the ſearcher of all hearts) and of all men, that he never intertained any diſ-loyall thought or contrived any treaſonable plot or machination againſt the ſacred perſons, dignity or authority of his late ſoveraign or of his preſent moſt ſacred Majeſty, and therefore with a clear conſcience may anſwer this dittay.

1. That the ſame is not ſpecial nor clear, but very obſcure and general, how and in what manner he was chief Ringleader of any factious partie.

2. Who that factious partie were, nor

3. By what deeds, and how he ſwayed the ſtate of affairs: Nor,

4. Theſe means by which and upon whom he procured his influence to prevail.

5. The alledged offers, made by his Majeſty are not expreſt. And therefore the ſaid articles are altogether general and inept.

2. The act of Parliament which the defender is alledged to have procured to have been made, is not produced, no indicat by number or Rubrick, nor does the Defender know any act of the tenour and title lybelled.

And

And the Defender in humility conceives, that it is not conſiſtent with the act libelled on, in the oppoſition of the Dittay, diſcharging perſons to impugn the authority of the Eſtates of Parliament, to term the members thereof, eſpecially in making an act (which being carried by plurality of voices, as the deed of the whole; and ſpecially ſuch an act, as is mentioned in the Libel (where there were none, or very few of a contrary judgement) *a factious party.*

13. The cauſe of the firſt member of the ſaid eight Article, anent the pretended act of Parliament, as is libelled, for abandoning and leaving his Majeſtie to the diſpoſal and mercy of his enemies, the Sectarian Army, does debond from the Acts of Parliament (as clearly appears) and can be ſubſumed on under none of the Acts of Parliament libelled: For if the tenth Act of Parliament, 1647. be underſtood and meaned, as the Act libelled (that being an Act of Parliament) the Defender humbly alledges, That an Act of an acknowledged lawful Parliament, ſhould be made a crime of acceſſion, whereunto a Member of Parliament ſhall be indicted (eſpecially for ſo high a crime as Treaſon) is without ground of Law or practice, and is hoped, the honorable Parliament will no ways ſuſtain it; and therefore, that he needs ſay no more now in confirmation hereof.

14. Likewiſe, all that is in that Act, and ſubſtance thereof, being the Eſtates of Parliament there declaring their concurrence for His Majeſties going to *Homeby*-houſe, or ſome other of his Houſes in and about *London*; and that expreſly, to ſatisfie the deſire both of His Majeſtie himſelf, and of His two Houſes of Parliament in *England*: And there to remain (not under the power of Sectaries) but with ſuch attendance about him, as both Houſes ſhould think fit to appoint, with reſpect alſo had to the ſafety and preſervation of his Royal Perſon. And the Eſtates therein do alſo declare againſt all harm and prejudice, violence or

ctious party who then ſwayed the eſtate of affaires both in councell and army did ſo contrive and complot, and by his influence ſo prevail, that after all faire offers made by his Majeſty and his deſire to have come and lived in *Scotland* till all differences in both Kingdoms had been ſetled, an act of *Parliament* was made for abandoning his Majeſty to the mercy of his inveterate enemies, the ſaid army of *Sectaries*.

It is anſwered that as he muſt continually acknowledge the late King and his preſent Majeſties acts of favour, honour and truſt: ſo muſt he ſtill deny (as he ſafly may in the preſence of God who is the ſearcher of all hearts) and of all men, that he never intertained any diſ-loyall thought or contrived any treaſonable plot or machination againſt the ſacred perſons, dignity or authority of his late ſoveraign or of his preſent moſt ſacred Majeſty, and therefore with a clear conſcience may anſwer this dittay.

1. That the ſame is not ſpecial nor clear, but very obſcure and general, how and in what manner he was chief Ringleader of any factious partie.

2. Who that factious partie were, nor

3. By what deeds, and how he ſwayed the ſtate of affairs: Nor,

4. Theſe means by which and upon whom he procured his influence to prevail.

5. The alledged offers, made by his Majeſty are not expreſt. And therefore the ſaid articles are altogether general and inept.

2. The act of Parliament which the defender is alledged to have procured to have been made, is not produced, no indicat by number or Rubrick, nor does the Defender know any act of the tenour and title lybelled.

And

And the Defender in humility conceives, that it is not conſiſtent with the act libelled on, in the oppoſition of the Dittay, diſcharging perſons to impugn the authority of the Eſtates of Parliament, to term the members thereof, eſpecially in making an act (which being carried by plurality of voices, as the deed of the whole; and ſpecially ſuch an act, as is mentioned in the Libel (where there were none, or very few of a contrary judgement) *a factions party.*

13. The cauſe of the firſt member of the ſaid eight Article, anent the pretended act of Parliament, as is libelled, for abandoning and leaving his Majeſtie to the diſpoſal and mercy of his enemies, the Sectarian Army, does debond from the Acts of Parliament (as clearly appears) and can be ſubſumed on under none of the Acts of Parliament libelled: For if the tenth Act of Parliament, 1647. be underſtood and meaned, as the Act libelled (that being an Act of Parliament) the Defender humbly alledges, That an Act of an acknowledged lawful Parliament, ſhould be made a crime of acceſſion, whereunto a Member of Parliament ſhall be indicted (eſpecially for ſo high a crime as Treaſon) is without ground of Law or practice, and is hoped, the honorable Parliament will no ways ſuſtain it; and therefore, that he needs ſay no more now in confirmation hereof.

14. Likewiſe, all that is in that Act, and ſubſtance thereof, being the Eſtates of Parliament there declaring their concurrence for His Majeſties going to *Homeby*-houſe, or ſome other of his Houſes in and about *London*; and that expreſly, to ſatisfie the deſire both of His Majeſtie himſelf, and of His two Houſes of Parliament in *England*: And there to remain (not under the power of Sectaries) but with ſuch attendance about him, as both Honſes ſhould think fit to appoint, with reſpect alſo had to the ſafety and preſervation of his Royal Perſon. And the Eſtates therein do alſo declare againſt all harm and prejudice, violence or

injury to be done to the ſame (as indeed it was horrid to think that any on earth ſhould have done) or prejudice to His Majeſties Poſterity: But thereafter it is clear from the fourth and ſeventh Acts of the Parliament, 1648. that the Sectarian Army diſobeyed, and threatned the Houſes of Parliament; impriſoned and baniſhed faithful Members, and by a ſudden ſurprizing, violently ſeized upon the Perſon of the Kings Majeſtie, carried Him from His Houſe at *Homeby*, againſt His own will, and declared Reſolutions of both Kingdoms, and kept him under their guards, till at length, *by their Power and Prevalency*, He was committed, and kept cloſe Priſoner at the Iſle of *Wight*, this being the true caſe out of the expreſs words of the Acts before cited.

As to that Declaration, Act. 10. Parl. 1647. The Defender alledges, 1. The Act bears expreſs, That it was to ſatisfie His Majeſties own deſire. 2. That it is homologat and approven by the Parliament, 1648. in ſo far, as by their fourth Act, intitulate, *Anent their Reſolutions concerning the breaches of Covenant and Treaties betwixt the Kingdom of* Scotland *and* England, and demands for reparation thereof; findes the violent ſeiſing on his Sacred Majeſties Perſon, and taking Him away from *Homeby*-houſe (as appears by Act 7.) by that Army, againſt the reſolutions of both Kingdoms, a breach: And amongſt the Reparations, they deſire expreſly, that conform to the former deſires of this Kingdom, the Kings Majeſtie may come with Honour, Freedom and Safety to ſome of his Houſes in or near *London*, that the Parliaments of both Kingdoms may make applications to him. And in their ſeventh Act, intituled, *A Declaration of the Parliament of* Scotland, *to all His Majeſties good Subjects of this Kingdom, concerning their reſolutions for Religion, King and Kingdom*, &c. After they declare, That violent ſeizing on His Majeſties Perſon, and carrying Him away by that Army, againſt the reſolutions of both Kingdoms, to be a breach: And they declare, they intend to ſend to the two Houſes of the Parliament of *England*, the Deſires following; which they call, *Neceſſary and juſt Deſires for Religion*,

ligion, His Majeſties good, and Peace of theſe Kingdoms; whereof this is one, *That conform to the former deſires of this Kingdom, The Kings Majeſtie may come with Honor, Freedom and Safety to ſome of His Houſes in or near* London; and declares, that thereafter they will endeavour it; and Act 8. in their deſires to both Houſes Parliament in *England*, the ſame deſire is repeated, *Conform to the former deſires of this Kingdom*. By all which it is clear, That the ſeizing upon His Sacred Majeſties Perſon, was the violent deed of that wicked Army, done with a violent ſurpriſal, againſt the declared reſolutions of both Kingdoms. And that His Majeſties coming to ſome of His Houſes in or about *London*, where both Kingdoms might make application to Him, conform to His Kingdoms deſire (which is that wherein the the Eſtates declares their concurrence with His Majeſtie, and both Houſes of Parliament in *England's* deſire in the ſaid tenth Act) is approven as a juſt and neceſſary deſire for His Majeſtie, and accordingly enacted among that Parliament, 1648. their deſires to the ſaid Houſes, and declare it ſhould be endeavoured, if refuſed, ſo highly is it approven by the ſaid Parliament. In reſpect whereof, ſpecially of the ſtanding Acts of Parliament, 1648. the Defender humbly craves, That albeit the Article was relievantly, diſtinctly, and clearly libelled and ſubſumed on ſome of the Acts of Parliament in the Propoſition condeſcended on (as he humbly conceives is not) yet he ought to be aſſolized therefrom.

And for further clearing what was the ground and occaſion of that Act, and the reaſons inducing the Defender and the Parliament at that time to go along therein, and how little ground there is for challenging him thereon, it would be conſidered, That when the late King came to the Army before *Newcaſtle*, the Defender was in *Ireland*, by Commiſſion from the Parliament, 1646. and that His Majeſties Declarations anent the grounds of His reſolution in coming to the Scots, was ſent both to the Committee of Eſtates in *Scotland*, and to the Parliament of *England*; ſo

that the ſame being printed before the Defender came to *Newcaſtle*, he neither did nor could know any other ground of his coming, nor what was contained in His Declaration, *viz.* His gracious Reſolution to comply with His Parliaments in both Nations, and thoſe entruſted by them in every thing, for ſetling of truth and peace; and that he would totally commit himſelf to their counſels and adviſes. Upon which terms, both the Committee of *Scotland*, and Officers of the Army, declared to His Majeſtie, and to the Parliament of *England*, that they received him: And all this before the Defender came from *Ireland* to *Newcaſtle*; from whence His Majeſtie ſent him with Inſtructions to the Commiſſioners at *London* (of which Commiſſioners the Defender was one alſo) to haſten the Propoſitions; and privately commanded the Defender, to take the advice of the Duke of *Richmond*, and Marqueis of *Hertford*, anent what might concern His Majeſtie; and particularly, if it was fit, that the Scots Army ſhould declare for His Majeſtie; whoſe judgement and opinion was (which they conjured him to tell his Majeſtie) that ſuch a courſe was the onely way at preſent to ruine his Majeſtie, for that he himſelf knew, That neither the Nobility or Gentry of *England*, who attended him at *Oxford*, wiſhed him to prevail over his Parliament by the ſword; and much leſs, would they indure the Scots Army to do it, and that it would make all *England* as one man againſt him: And that it was their earneſt requeſt to His Majeſtie, by any means to give way to the Propoſitions. Which advice he not onely faithfully told to His Majeſtie at *Newcaſtle*, and many others there, and to our gracious Soveraign who now is, when he was in *Scotland*; but alſo being in the Tower, he intreated the Lieutenant thereof to propoſe for him, that the Marqueſs of *Hertford* who was then alive, might be examined in this matter; which was put off from time to time, becauſe of His Majeſties great affairs. And as it is moſt certain, that as neither Independent nor Sectary was able to carry one vote in the Houſe at that time, ſo it is notior, that they who tendred His

Majeſtie

Majesty most in *England* were for disbanding the Scots Army, and His Majesties staying in *England*, wherein the Defendor appeals to the particular knowledge of the Earl of *Lauderdale*, *Loudon*, Sir *Charls Erskin*, and the rest of the Commissioners then there; and it is of truth which all know, that so little fear, suspicion and jealousie there was of what followed, That the great fear of His Majesties friends in both Kingdoms was, That if he fixed on his Subjects in *Scotland*, all *England* would be against him, and probably cast off His Government and Interest for ever: So that under what representation soever the matter may now appear (because of the sad sequels) yet to them who know the matter as it was there stated, what Declarations and Assurances there were from the Parliament of *England*, and how little fear of the prevalency of Sectaries, it did appear to be an act (if not of necessity) at least an act very expedient and convenient for the time, otherways many who did assent thereto would never have condescended; and consequently the defendors concurring therein, upon such probable grounds can be no such crime as is libelled; nor is it relevant to answer the conclusion of the Ditay.

To the second member of this Article, bearing, that under pretext for satisfaction for the arrears of the Army he went to *London*, and there treasonably gave up, at least condescended to the upgiving of his dread Soveraign and Master; as being imposed so to do by the Kingdom of *Scotland*.

It is answered: This member is not relevant, because neither the time of his going to *London*, nor of his being there, the persons to whom he condescended to give up, are not particularly mentioned and set down.

By which generality he is precluded from several defences which might arise to him if the Ditay were clear, and it is a principle in Common Law and of constant practice, That *non est vagandum in crimine sed debet certum & speciatim dici*, for that *dolus & error versantur in generalibus*.

2. No

2. No ways acknowledging the relievancy of the ſubſumption herein, upon any of the Acts of the Propoſition; till the ſame be clearly condeſcended on, and craving the ſame may be firſt done, Oppones the Act of Parliament, and the truth is while the Defendor was at *London* there was nothing ſpoken at all by him of leaving his Majeſty in *England* except what he was expreſly commanded by his Majeſty to ſpeak to *Richmond* and *Hertford* as aforeſaid.

To the third Member of the eighth Article, bearing, *That in a joynt Committee of both Kingdoms, where the Engliſh queſtioned whether the Scots Army would concur with them in their ſaid Treaſon and Treachery; the Defendor after many arguments uſed in their favour, earneſtly requeſted them to have patience for a little time, and that it would appear how far they intended to concur: And that within few days thereafter there was a Declaration and Vindication emitted in name of the ſaid Army, holding forth That in caſe his Majeſty did not condeſcend to all the deſires of both Kingdoms, which were no leſs then diveſting himſelf of all Regal Power, Civil, Eccleſiaſtical and Military, they would deliver him up, which immediately upon the receit of Two hundred thouſand pounds the Defendor and they did.*

It is Anſwered, That adhering to the former defences anent the ſubſumption, and repeating it here, This member although it were rightly ſubſumed (as it is not) is moſt irreleivant and general in time, place, perſon and ſpeeches, mention being made of many arguments, and never one produced, and of a Queſtion and Anſwer, out of which (even as libelled) Treaſon cannot be inferred, *viz. That the Defendor requeſted them to have patience a while, and it would appear how far the Army intended to concur; but within few days after the Army declared themſelves in manner as aforeſaid.* Seeing theſe alledged words of the Defendor, as they are indefinite and general, ſo the moſt they could infer is, *That in a ſhort time it would appear whether the Army would concur or not*; and what can from thence be inferred,

ed, as to any thing the Army did; if they have outshot their duty, as it was in regard of him, with the speaking of these words, a future contingent wherein the Defendor had no causualty, so they must answer for themselves, and not the Defendor.

And for ought he knows there was never any such Declaration emitted, neither should there be any captious use made of words, if there had been any such words spoken, as there was never, especially to infer his Treason, for that *Lubricum linguæ*, is oftner a frailty then a fault; and that by all Doctors of both Laws it is constantly held that *verba debent intelligi ne sonent in delictum*. And that *in dubio* they should be interpreted *a proferenti*. And therefore no ways acknowleding the words and deeds libelled, except in so far as concerns the Defendor his vote to the Declaration, and as the circumstance libelled, That *the delivery of his Majesty was immediately after the payment of* 200000 *l.* it is clear that there was no respect to that money in what was done therein, by the Act of 7. Parl. 1648. wherein the Estates there declare, *That money was never the cause nor motive of any of our undertakings and resolutions, whatever enemies had falsly suggested of that kind.* And lastly, adhering to his former defences oppones to this whole Article the Treaty at *Breda*, and the Acts of Parliament of Oblivion and Ratification.

As to the Ninth Article, and whole first member thereof, bearing, *That the Defendor opposed the proceedings of Parliament*, 1648 *by arguing, voting, and after the resolutions of Parliament were past in an Act, in protesting against the same.*

It is alledged for the Defendor, 1. It is not condescended under which of the Acts of Parliament libelled on in the proposition, this Article is subsumed; and therefore the libel as to that member of the Article, for arguing, voting and protesting, is inept, and the Defendor hath just reason in such an incertitude to denyit that can be relevantly

leivantly ſubſumed on any of the ſaid Acts of Parliament.

2. Arguing and voting is no ways releivant to infer the concluſion of the Ditray, becauſe by Divine law, Law of Nations, Statutes and practices of this Kingdom, *in deliberanda*, a Member of Parliament or other Councel ſhould give advice or ſuffrage according to his perſwaſion of the good or ill of the ſubject debated on, and under conſideration, wherein if his reaſon cannot bring him up, nor his conſcience admit him the length of others in ſuch publick Counſels, he ought to have charity for the one and excuſe for the other.

Like as by the 5. Act Parl. 2. K. *Charls* the Firſt, It is expreſly ſtatute *That every member of Parliament ſhall faithfully and freely ſpeak, anſwer and expreſs themſelves upon all and every thing which is propounded in ſo far as they think in their conſcience may conduce to the glory of God, the peace of the Church and State, and employ their beſt endeavours to promove the ſame.* Under which oath (read in the audience of the late King, and by him approven in the Parliament 1641.) the Defendor, as a Peer of that Parliament in *anno* 1648. was ſolemnly tied to the Dictates of his Reaſon and preſcripts of his Conſcience, and cannot be called in queſtion as a member, having freedom therein: and conform thereto, is the oath of this preſent Parliament, bearing that every member ſhall faithfully and freely according to their beſt judgement give their advice and vote in Parliament.

To the ſecond part of the firſt member of the ſaid Article anent the Defendor *his proteſting and diſſenting from the ſaid Act*, 1648.

It is alledged for the Defendor, The Proteſtation not produced, as it ought to be, whereby it will appear that if any was, the ſame was before the Act of Parliament paſt, and that they did only proteſt and enter their diſſent againſt proceeding to the determination of the queſtion then

in

in hand which evinces the ſame to have been before the Act was made. Like as the Defender offers himſelf to prove by the Members of Parliament then preſent, That being asked if they would renew the Proteſtation after the Act, they ſhunned to do the ſame, the Act being now paſt.

2 *Abſolvitor* (Though the ſame were produced) becauſe it is offered to be proven, That the ſame was ratified In the fourth Act Parl. 2. Seſſ. 2. *Cha.* 2. which was approven at the Treaty at *Breda*, and confirmed at *Perth* and *Sterling*, as is ſaid. But for the honorable Parliament, their more full clearing anent the Defenders carriage in the ſaid particular, It is offered to be proven, if need be is, That the Defender (before the Commiſſioners return from the ſaid Iſle of *Wight*, in the ſaid year) when he heard that His Majeſtie had ſatisfied his peoples deſires concerning Religion, in preſence of divers perſons of honour, he expreſt himſelf paſſionately earneſt to engage for his Majeſties freedom. Like as the only difference of the opinion anent the Engagement was in the manner the grounds of theſe that were diſſatisfied, being as they are expreſt in the ſaid Proteſtation, *viz. That the Parliament ſhould not proceed till the Commiſſion of the Church were conſulted and aiding alſo* (which is not therein expreſt) *till advertiſement and three months warning were given, conform to the large Treaty; until all means of peace had been firſt eſſayed, and while firſt the lawfulneſs and neceſſity of that war ſhould be found by the Parliament*, conform to the 7. Act thereof. And it is humbly conceived that many in this preſent Parliament do remember how unanimous all were that His Majeſty ſhould be brought out of the hands of the Sectaries, to ſome of His Houſes in or about *London*. And all they differed in was, That the Church ſhould be conſulted anent the ſecuring of Religion, all means of peace ſhould firſt been eſſayed, and warning given in manner aforeſaid, conform to the large Treaty, the breach whereof was made one of the grounds of that Declaration, Act 7. And it cannot be refuted but

that at ſeveral meetings the diſſenters debated the dangerouſneſs of of that War (eſpecially if the Army ſhould be defeated) from the ſad conſequences that might thereupon enſue to King, Kingdom and Religion, as immediately thereafter fell out. Whereas had the Nation been intire and whole in their power and force that Army of Sectaries in probability would not have dared to have attempted thoſe matters which afterwards they did; ſo that the caſe being truly ſtated there will appear no malice againſt his Majeſties Perſon, Authority, and Reſtitution thereof, but an unclearneſs to enter into a War of ſuch danger and hazard, and the reſpect they had to the ſecurity of Religion (as all then profeſſed) according to the Covenant,

To the ſecond member of the Ninth Article, whereby it is alleadged, *That in contempt of the authority of that Parliament, and againſt the preſervation of his Majeſties perſon and Authority; that the Defender convocated an Army of rebellious Subjects, and therewith committed divers and ſundry outrages, ſlaughters and waſtations upon the perſons and eſtates of his Majeſties Subjects, invaded Cities and Caſtles, ſeiſed upon Magazeens, Arms and Ammunition, and called in an Army of Sectaries to his aſſiſtance.*

It is anſwered, 1. That the ſame is not relievantly ſubſumed upon any act of the propoſition; at leaſt till the Advocate condeſcend upon which Act thereof the ſame is founded, the defendor is not bound to make anſwer.

Secondly, The Defendor denies that he did convocate theſe Forces, or gave counſel or command therefore; and as to his being with them he muſt be aſſolied.

1. Becauſe by a treaty at *Sterling* betwixt the chief Officers in the Army then alive, and out of priſon, and a Quorum of Members of the Committee by authorite of Parliament, 1648. who had power to order the incident affairs of the Nation, the ſaid meeting, and all acts of hoſtility, and others there-

thereby committed are expreſly diſcharged, *hinc inde* and a mutual Oblivion and Indemnity therefore.

2. Any meeting he had with them was by a call of thoſe of the Committee of Eſtates, who joyned with thoſe forces, and who in the Treaty is acknowledged the Committee of Eſtates.

3. The ſaid meeting and acting thereof, together with the Treaty and Articles thereof is ratified and approved by the third Act 2 Parl. 2 Seſſ. *Ch.* 2.

The third member of the ninth Article, bearing *That apprehending his power was not able to withſtand his Majeſties good Subjects, The Defendor called in to his aſſiſtance the Army of Sectaries, and that he went into* Mordington *and met with the Commander of that Army, had private conſultations with him, and prevailed with him to come to* Edenburgh *with his Army, whoſe coming he might have hindered, Becauſe* Oliver *ſaid That he could not help his lying upon the Tenants of* Mordington, *for that his ſtaying and going depended upon the Defendor: And that he did countenance and conſult with the Sectaries and their Commanders in* Edenburgh *or the* Canongate, *in the houſe called the Lady* Humes *Lodging.*

It is anſwered, That as to ſpeeches and conſultations in general, not releivant except they were condeſcended on; and as to the words ſpoken by *Cromwel*, if ſpoken by him, it was a lie, and can infer nothing againſt the Defendor, and the occaſion of his ſtay was till he got *Barwick* and *Carliſle*; which could not be reſtored till the Treaty at *Sterling* was cloſed: And as to his his meeting and treating with him, *abſolvitur*, becauſe he and others did the ſame by warrant of the Committee, and which Treaty was ratified in the foreſaid Act of Parliament thereafter.

To the Fourth member, *That he concealed and voted to the drawing up of a letter directed to* Cromwel, *wherein he and his Complices engaged themſelves in name of the Kingdom of* Scotland, *to do their utmoſt endeavours, that none who*

had been acceſſory to the Engagement, or in arms at Sterling *in purſuance thereof ſhould be employed in any place of truſt, without the advice and conſent of the Parliament.*

It is anſwered, 1 No ſuch letter produced.

2. Though it were produced, yet conſenting and voting not releivant, Becauſe a vote in the Committee of Eſtates can infer no crime againſt the Defender or any member thereof, nor any Act paſt in the ſaid Committee, eſpecially ſeeing,

3. The Acts of the ſaid Committee was ratified in the fourth Act of the Parliament foreſaid, all ratified thereafter by the Treaty at *Breda*, and Acts of Ratification at *Perth* and *Sterling*; and the neceſſity thereof, would be alſo conſidered, in reſpect of the large Treaty, both Kingdoms having given their publick faith that the breakers ſhould be rendred up to the obſervers, and that the Engliſh Army then upon the borders required the performance thereof, againſt the engagers and for further ſecurity, pledges and places of ſtrength: It was at that time counted a great favour (conſidering their power to have made their own terms) when they might have impoſed and forced to what they pleaſed more, yet they did accept this act.

To the Fifth member of this Article bearing, *That he did draw up, at leaſt did counſel the drawing of certain inſtructions, given to* Sir John Chieſly, *proporting, That the Noblemen, Gentlemen of quality and conſiderable Officers who went into* England *under Duke* Hamilton, *and were there priſoners ſhould be kept as pledges for the peace of the Kingdom.*

It is anſwered 1. Not produced as it ought to be, that it may thereby appear whether he ſubſcribed the ſame or not.

2. Not releivant (one of the Committee) except it were libelled preſent, and voted at that time, for *Nova caput ſequitur.*

3. Not releivant, voted *Quia in Senatu nemo tenetur de conſilio.*

4. Oppones the Authority of the Committee, Treaty, Acts of Parliament, and Ratifications aforeſaid.

To

To the laſt member of this Article, bearing, *That he gave warrant under his hand, for iſſuing of a Proclamation againſt the Families of the Laird of* Ras *and* Vyres.

It is alledged for the Defender, 1. No ſuch warrant produced, if any ſuch warrant were produced under the Defendors hand, it will certainly appear to be as Preſident of ſome Committee, & ſo not his perſonal deed, nor ſuch a deed as can infer any a crime againſt him. 3. No ſuch Proclamation enſued.

4. Although enſued, yet that took no effect, and ſo was *Mine tantum et animus ad effectum non perductus.*

5. Oppones the Act of the Committee, and Act of Parliament, 1649. aforeſaid, which Parliament and the whole Act thereof is ratified in the Treaty at *Breda* and approved in the Parliament at St. *Johnſtores* and *Sterling*, wherein was alſo made an Act of Oblivion, oftentimes before alledged on; in reſpect whereof the defendor ought to be aſſolzied from the ſaid Ninth Article and whole member thereof, and all therein contained. And becauſe the Defendor has in his defences ſo oft alleadged the Act of Parliament, 1649. for his vindication, he deſires that it may be obſerved (which is very obſervable) that by the printed Treaty at *Edenburgh* and *Sterling*, *September* 1648. it is agreed and appointed by thoſe of the Committee at *Sterling*, 1648, that a Parliament ſhould ſit down before the 10. of *January* next; conform thereunto they did convene and ſit down the fourth of the Moneth of *Janu.* as by the ſaid Treaty, and the firſt and third Acts of the Parliament doth appear, whereby it is clear That the ſaid Parliament, 1649. was appointed to ſit by the Committee of the Parliament 1648, who had power by the laſt Act of the ſaid Parl to convene the Parliament before the firſt Thurſday in *March*, 1650. if they thought fit; as alſo that Seſſ. of the Parl. 1649. by the laſt Act thereof continues the ſame to the firſt Thurſday in *March* 1650. at which day they convened in the next Seſſions, and therein ratified the Act of Parliament made in the former Seſſion, and which day was the diet to which the Parliament 1648. continued the ſame with

power

power, to the Committee of Estates, to convene the same sooner, if they thought fit, as is said. Whence it is evident, that the said Parliament, 1649. whether as appointed by the uncontroverted Commitie, 1648, at *Sterling*, in the first Session, or as is continued to the first *Tuesday* of *March*, 1650. in the second Session (both conform to the last Act of the Parliament, 1648. must subsist and sway the said Defender his just reason, to found his Defences upon the acts thereof. It is also further considerable as to the Loyalty of that Parliament, that therein the murther of his late Majestie was declared against, his present Majestie proclaimed and brought home, his subjects of this Nation reconciled to him, and taken into favour, an Army appointed to oppose his Enemies, the Crown set upon his head, and that Session of *Perth*, wherein the whole preceding proceedings were approven, was dignified by the presence of his Royal Person.

And to the tenth Article, and that part thereof where it is libelled, *That the Defender in* Anno 1649. *not daring to oppose in publique, or in a direct way His Majesties home coming, he procured the Application made, to be clogged with such Limitations and Restrictions, as were most derogatory to Monarchical Government, as is alledged to be more fully expresst in the Commission, Instructions and Addresses, which are repeated as a part of the Libel.*

It is alledged for the Defender: 1. Seeing the said Commission, Instruction and Addresses are libelled on, and repeated as a part of the Dittay; in all Law and form of Proces, they ought to be produced with the Libel, for the reason adduced in the defence, against the relievancy of the proposition of the Dittay; and till which be produced, it cannot be consistent with the said Limitations and Restrictions, and how far they are derogatory to Monarchical Government, and therefore till then, there can be no Proces.

2. It

2. It is not condeſcended nor cleared on, which of the acts libelled on in the Propoſition, this Article and members thereof are ſubſumed, and therefore it is obſcure and inept; and in that incertitude, the Defender has juſt reaſon to deny, that it can be ſubſumed on any of the ſaid Acts, to infer the crime and pain libelled againſt the Defender, none of the ſaid Statutes making any mention of treating or infering any pain therefore; likewiſe after ruptures and differences betwixt a King and his Subjects, all Lawyers and Politicians do agree, That the beſt and ſafeſt way of removing the ſame, is by Treaty; and being concluded on, it is alſo their opinions, That the ſame are to be obſerved, at leaſt ſo far as to exempt the Subjects from puniſhment, to whom indempnity has been thereby promiſed; and in this *Grotius de Jure belli & pacis, lib. 3. cap. 19.* is moſt clear, and many others, who write on that ſubject; and therefore the ſaid Treaty being concluded, and after ratified by his Majeſtie and his Parliament, the Defender cannot be called in queſtion for his acceſſion thereto, nor the pain of Treaſon thereupon inferred; for the ſaid Treaty and conditions thereof being accepted and agreed to by his Majeſties voluntary Contract cannot be like as a crime, far leſs ſo high a crime as Treaſon againſt the Defender.

3. *Abſolvitor* from that member of the ſaid Article, becauſe not onely after the ſaid Treaty, did His Majeſtie tacitely remit any crime, if any was, in the ſaid Treaty, by admitting the Defender to places of truſt, by receving the Crown from his hand at the Coronation, and by admitting him to take the Oath of Allegiance, and to be a Member of his Majeſties privy Council; but alſo after the ſaid Treaty was ratified, there was an Act of Pardon and Oblivion by his Majeſtie and Eſtates of Parliament oftimes before alledged, and is here repeated.

Though the above written defences be relievant in Law, as to the ſaid member, yet for the Defenders further vindication, the Honorable Parliament would take notice, that all along the preceding Articles, all the publike actings from the

the year of God, 1640. to the year 1648. (wherein the Generality and Repreſentatives, both Civil and Eccleſiaſtick in the Kingdom concurred) are charged upon the Defender as his particular actings, or as if the Defender had been ſpecial author, whereas in this Article anent the treating with, and home bringing of his Majeſtie (therein it is known the Defender, according to his bound duty) was moſt active and zealous, and therein he wreſtled with all his might, and by his pains and Gods bleſſing thereon, overcame many difficulties, and did effectuate the ſame. The Libeller does ſo far detract from the Defenders faithful diſcharge of his duty in this ſo glorious action, and without libelling the leaſt preſumption of any circumſtance to make the ſame probable, the Defender is accuſed, as if he had in his judgement been againſt his Majeſties home coming; which becauſe he durſt not avow publiquely, therefore he betook himſelf to underhand dealing; To clog the Treaty with Limitations and Reſtrictions; excluding the Defender from all acceſſion to the ſaid duty, in ſo far as it was good; *viz.* To bring home the King, and making him to be the ſole author of all libelled to be evil therein (to wit of the limitations and reſtrictions) whereas the truth is, he was active in the Kings home bringing, and was paſſive in the other, having laboured what he could that there ſhould be as few conditions, and the ſame as ſatisfactory to his Majeſtie as was poſſible at that time to obtain, which is known to all that did tranſact in the ſaid affair, and which if need be, is offered to be proven. And for further clearing hereof, if this Article ſhall be further inſiſted on, my Lord Advocate will be pleaſed to condeſcend who the parties were, that made the motion for addreſſes to his Majeſtie, of whom the Defendent ſhould have been afraid, if he had been of a contrary judgement, to have oppoſed open'y; for if the Defender had ſo great ſway in affairs (as all along the preceding Articles he is allowed to have had: and alſo, if he had intended (as is broadly and with foul mouth alledged) in the ſaid Libel all along alledged, to have extirped and

evacuated

evacuated the Kings Majeſties Authority, Government and Poſterity, and had ſuch correſpondence with thoſe abominable Regicides, as all are perſwaded by the ſaid libel to believe, in the ſaid year of God 1649. when the ſaid Traytors were ſtrong, and both this land through diviſions and otherways very low, and when the power was in the Defendor and his complices their hands (as my Lord Advocate is pleaſed to libel and term them) who at that time had the managing of affairs; then was the fitteſt time and beſt opportunity, if they had any ſuch diſloyal thoughts, to have ſhaken off that Government; but ſo far did they abhor any ſuch treachery, That they not only proclaimed His Majeſty, and according to their duty owned His Intereſt (even with the hazard of their lives and fortunes) there being none ſo ſhallow but eaſily might have ſeen that the diſcharge of the ſaid duty would bring upon themſelves and the Nation the power of *England* (the onely power of Arms and Armies being at that time in the abominable Regicides their hands:) who did immediately thereafter invade this Kingdom.

As to the other member of the Tenth Article, whereby it is libelled, *That the Defendor (to obſtruct His Majeſties purpoſe, yea in ſo far as in him lay, and to terrifie him therefrom, by his and his complices crulelty executed upon the Marqueſs of* Montroſs, *who as his Majeſties Commiſſioner did repreſent his Majeſties perſon) cauſed to murder the ſaid Marqueſs in* anno 1650. *in manner*, &c.

1. It is no way releivantly libelled, that the Defendor in general cauſed murder him, except it were condeſcended *quo modo* he cauſed; and if thereby be meant his voycing in Parliament 1649. in the ſaid matter; *non relevat*, becauſe a vote, Act or ſentence of Parliament is no way releivant to infer a crime againſt any particular member therein, as hath been oft before alleadged.

Likewiſe 2. The ſentence of the forfeiture of the life and eſtate of the ſaid Marqueſs, was no decree of the Parlia-

ment 1649. but of the Parliament 1645, which was homologat by ſeveral other Acts of Parliament, excepting the ſaid Marqueſs among other excepted perſons, as ſpecially by and by the 22 Act of the Parliament 1648.

And yet 3. The Defendor did not vote in the buſineſs of *Montroſs*, as he can prove (if need be is,) by the members there preſent 1649. And as to the aggravations of the ſaid Murder, the ſaid Marqueſs being His Majeſties Commiſſioner for the time, It is no way a releivant circumſtance to aggravate the ſame, except it had been libelled, That the ſaid Commiſſion had been ſhown to the Parliament, which no body can affirm; but on the contrary, the ſaid Parliament conceived they had juſt reaſon to preſume that there could be no ſuch Commiſſion for his coming againſt them at that time, becauſe His Majeſty after the murder of His Royal Father, very graciouſly had admitted their gracious Applications to him.

Likeas before *Montroſs* his coming at that time to *Scotland*, and always thereafter, His Majeſty had a Committee of the ſaid Parliament, under the name and title of the Committee of Eſtates of His Majeſties Kingdom of *Scotland*.

As to the Defendor his alledged *keeping correſpondency with* Cromwel *in the year* 1650. As the ſame is irreleivantly libelled, no deeds nor acts or correſpondency being condeſcended on; ſo there was never any ſuch thing. And there was one named *Hamilton*, who vented this untruth, hanged at *Sterling*, and at his death did declare, That the ſame was a moſt unjuſt calumny; and it is not to be beleived that at that time he would have charged his ſoul with a lie, and in Law the words of a dying man are oricitouſly beleived.

As to the Act of the Weſt-Kirk, the Defendor (no ways acknowledging the releivance of the ſaid Article, as it is libelled) was ſo free from having the leaſt acceſſion to the ſaid Act or Declaration; that ſo ſoon as he got knowledg

ledge thereof, to evidence his fidelity to his Majesty, it is offered to be proved by witness (for their loyalty above all exception) that when the first news came that the Commissioners were about the drawing of the said Act, the Defendor gave advice to His Majesty, To draw a fair Declaration, and to go such a length, as in freedom he could, that thereby he might prevene the said Act, and obviate the pressing thereof: But as for the other that was pressed, he was altogether against the same, and dealt with the Minister who came from the Commission of the Kirk, to forbear pressing His Majesty therewith, which also if need were might be proved.

As to the eleventh Article and subsequent Articles, because the same are for deeds of compliance after the Usurpers had prevailed and were in possession: Before the Defendor make particular answer it is necessary to premise in general, that it being notoriously known to the world (to the eternal honor of this Kingdom) as for that damnable usurpation of *Oliver*, not onely we were not active in establishing the same, but according to our bound allegiance to our Soveraign, were to the utmost possibility of our power in arms under His Majesty, and other ways active against him, and in opposition thereto, many lost their estates, many their lives, and all of us our liberties; and when we could do no more, being oppressed by the force of the said Usurper (as a chaste forced Virgin) we cried to God and man, attesting Heaven and earth against Usurpers, even when their bloody swords were at our throats, he and his Army, amongst many other execrable mischiefs, were also guilty of this usurpation. We have suffered, and been only passive under that irresistable force. And as this was the condition of the Kingdom, so specially the Defendor, who as he had been most active and instrumental in His Majesties home-bringing (which was the only ground of the quarrel, and for which he was looked upon by them, as one of their capital enemies) even so after it

pleaſed God for our exerciſe and puniſhment, to ſuffer their power to prevail over all his Majeſties Forces, and over this Kingdom, ſuch averſion had the Defender, even ſo much as to live under their power, let be, to comply actively with them, that after *Worceſter*, the Defender offered to Mr. *David Dick*, if he could get his company, or the company of any other honeſt Miniſter, that he would never capitulate with any Engliſhman, ſo long as he could ſubſiſt in any part of *Scotland*, either his lands or Iſles thereupon: It is humbly craved, that Mr. *David Dick* may be examined; neither did the Defender ever capitulate with them, till *Auguſt*, 1652. having before that endeavoured, all that in him lay, to have perſwaded thoſe of *Athol*, *Monteith*, and other his Neighbours in the Highlands, to have concurred with him, that they might have joyntly made ſome probable force for reſiſting the overſpreading power of the Uſurper, but all in vain: Likewiſe, long before that time, the whole Forces and Strengths of the Kingdom were ſurrendred, yea, the whole Kingdom, by their Deputies and Repreſentatives (who met at *Dalkeith* with the Commiſſioners of the *Parliament* of *England*, ſo called) was forced to ſubmit to their power, and accept the tender of the union of this Nation with *England*, proffered by them; Neither did he at the ſaid time in *Auguſt*, 1652. voluntarily come in and capitulate with the ſaid Engliſh; but was ſurprized (ſeveral Regiments of their Forces, horſe and foot, having ſuddenly come about his Houſe where he was for the time, lying deadly ſick) as can be teſtified by Dr. *Cunningham*, who was with him for the time, and is humbly craved to be examined thereon: As alſo, notwithſtanding of the ſaid ſurprizal, and the Defenders condition, though they threatned, notwithſtanding of his ſickneſs, to carry him away priſoner, yet all their threatning could not prevail with him, but he did abſolutely refuſe to ſubſcribe the Articles firſt offered, which contained the tender of the union, and an obligement upon his part, to promote the ſame, and the Government as then eſtabliſhed, and to live peaceably; yea,

ſuch

ſuch jealouſie had they of the Defender, that by his Capitulation, he was priſoner upon demand: Nither during all the time of their power over this Kingdom, had he ever any favour of the ſaid Engliſh, but was always lo'kt upon by them with a moſt jealous eye: And for evidencing hereof, the Defender humbly craves, that there be Commiſſion granted for examining of Lieutenant Colonel *Utter* (anent what was deponed by Mac *Nachtan*, and ſeveral, *viz.* of the Defenders ſmall affection to the Engliſh, or any other authority but the Kings. Likewiſe, it is notorious how unjuſtly he was perſecuted before the Exchequer here for the time, for payment of 4000 l. *Sterling*, alledged to be reſt and bygon few duties. This being the Defenders true caſe, it is hoped, that the honorable Court of Parliament, will take conſideration how the Defender ſtood out as long as he could, till he was priſoner; and will have a different conſideration of Subjects acting under the lawful Magiſtrate in exerciſe of his Authority by himſelf, or others lawfully conſtituted by him; and of the actions under cruel Uſurpation and Tyrannie, the lawful Magiſtrate being forced for his own ſafety, to abandon his Dominions and people to the luſt and oppreſſion of the unjuſt Uſurper, (who was Maſter not onely of their fortunes and perſons, but their lives, and all that was dear to them) and had for a long time detained the poſſeſſion of his unjuſt Uſurpation, and devoured the lawful Magiſtrate: Which caſe is not onely differenced by all who write on that ſubject, but alſo *Cook* in the third part of the Inſtitutes of the Laws of *England*, *cap.* 10. anent his Treaſon, in expounding the Statute of the 25 of *Edward* the third, upon the words of the Statute *Le Roy*, puts ſuch weight upon the Kings being in poſſeſſion, or one of the ſame, that he expreſly affirms, the Statute is to be underſtood of a King regnant, and in poſſeſſion of the Crown and Kingdome; as alſo, that in ſuch caſes, a favorable conſideration is to be had of the actions of a ſubject who was particularly noticed, and jealouſly looked upon by the Uſurper, for his affection to the lawful Magiſtrate and

his

his Government: (All which being remitted to the Commiſſioner his grace, and the Honourable Parliament their conſideration) he now comes to anſwer to the eleventh Article: Againſt which eleventh Article, and all the members thereof, as libelled it is alledged, the ſaid Article is general, not condeſcending on the day or moneth, nor on the particular year of God of the committing of the deeds therein libelled, but onely alternative in *Anno* 1653. or 1654. and therefore (as has been oft before alledged) the ſame is inept, and there can be no proces thereon. 2. It is not condeſcending on, nor cleared, which of the acts of Parliament libelled on in the Propoſition, this Article, and ſeveral members thereof, are ſubſumed, and therefore it is obſcure and general, and in that incertitude, the Defender has reaſon to deny, that it can be ſubſumed on any of the ſaid Acts, to infer the ſaid crime ond pain.

As to that which is firſt libelled in this Article, *That the Defender did not riſe in Arms with the Commiſſioner his grace, and the Earl of* Glencarn, *who were Commiſſioners by his Majeſtie.* The Defender he repeats the two exceptions aforeſaid againſt the whole Article, being confident this cannot be ſubſumed on none of the Acts libelled on: And further alledges, that it is not relievancy libelled, to infer, (*vel minimam culpam*) againſt the Defender, far leſs ſo high a crime, except it were libelled, that your Lordſhips Commiſſioner had been ſhewed him, and he required, which was never done: And herein he may refer himſelf to the Commiſſioner, his Graces Declaration, and if his Grace does not remember, that the Defender ſent him word, ſhewing his deſire to have met with his Grace, and to have ſpoke with him about the buſineſs; but had never the honour to have his Graces anſwer or appointment.

2. For further clearing, that his not joyning, except he had been required, is no crime, it is evident from the fourth Act of the firſt Parliament, *Jac.* 1. that thoſe onely are puniſhable, who does not aſſiſt the Kings Hoſt, being required thereto: And *Craig. pag.* 365. ſays, that becauſe the King has

has ſo many Vaſſals, they are not obliged, nor cannot be puniſhed, except the particular pain to be inflicted upon the away-ſtayer, be particularly expreſt in the Edict by which they are commanded to appear: and pag. 365. he ſays, That theſe who come not, being warned by an Edict, ſhall be counted, and pag 370. he ſays, That the Vaſſal ſhould not be obliged to appear at any ſuch ſervices, except they be deſired; which command ſhould be proven by his Peers: Theſe Edicts were particularly required by the fundamental Law, and were called *heri bona*, which is defined by *Cujas* to be the calling and citation of the Army, and is *lib. 3. c. 10. quæſt. leg. franc.* to be the puniſhment of him who comes not to the Kings Hoſt, when he is called, and this aſſertion is clearly proven from *Ragne*, in his Treatiſe *de Jur. Reg. pag.* 53. Likewiſe by the ſaid Act par. 1. *Jac* 1. it is expreſly ordained, That thoſe who diſobeys to enforce the King againſt notorious Rebels againſt his Perſon, ſhall be challenged,

1. If they be required by the King, as is ſaid,

2. And except they have for them reaſonable excuſes: but ſure it is, the Defender not only was never required, as has been alledged, but there was even pregnant reaſons, as he humbly conceives, the which it ſeemed very probable at that time, that albeit it be the duty of all his Majeſties ſubjects, to riſe for his Majeſties intereſt, in oppoſition to Uſurpers, yet it was not ſeaſonable, as affairs then ſtood, till either they had been defeated by ſea in the ingagement that they then had with *Holland* (whereby both the forces might have been diverted, and the Tranſportation of Victuals and Ammunition from *England*, *Ireland*, and the parts of *Scotland* under their command, and their Army in *Scotland*, might have been intercluded;) or that *Spain* and *France* had concluded that peace whereof there was then ſeveral reports, and thereupon his Majeſties ſubjects in *Scotland*, might have had hope of ſome probable aſſiſtance in the undertakings in his Majeſties ſervice; or that diviſion and in conſequence confuſion, had fallen out in the Engliſh Army,

Army amongſt themſelves, whereof there ſeemed to be but little hope, ſo long as the appearance for His Majeſty ſhould meet them as againſt a common enemy, as it was. Likeas it would be thought it ſhould have no other effect; and as in effect the event proved, that that Army never divided till they had no common enemy, againſt whom mutual preſervation does neceſſitate a mutual concurſe, but all at amity one with another. And albeit a particular command had not been abſolutely neceſſary (if His Majeſty had been there in perſon) yet in a juncture of time wherein ſuch a War was improbable for many ſtate reaſons (which induces the Defendor to beleive that there was no Commiſſion granted at that time) which preſumptions *excuſant a dolo*, and without dole (as has been ſaid formerly) there can be no crime: And though he had been required, yet could not have been puniſhed for his not obeying, ſeeing in effect he was the enemies priſoner upon demand.

But this is conceived onely to be libelled as an aggravation of what followed, which is, *That he joyned in open hoſtility with the Uſurpers forces, eſpecially with the Colonels* Overton, *and* Twiſleton, *at the leaſt* Cobbet *and* Twiſleton, *at the leaſt* Twilleton, *when he was in the Highlands, and in oppoſition to the ſaid Earls.*

It is anſwered, 1. This member is general, not condeſcending upon the particular deeds of hoſtility, and therefore inept, for criminal libelling ought to be moſt clear, as is affirmed by *Damhand, cap.* 30. *prax. Cron. Num.* 4. and ſhould contain all the qualities of the crime alledged committed. And as to the alternative, That he joyned with one or other of them, it is moſt lax and obſcure, and therefore in that alſo this Dittay is inept: And for the alternative added (*at the leaſt he gave counſel*) *non relevat* (becauſe general) except the counſel were condeſcended on, and that it were ſuch as might fall under the Acts libelled on; and the moſt that can be alleadged, if the time were condeſcended on of his alleadged joyning, is, that he was in company

company (it may be with *Twiſleton*, and if it was, he was onely going along with him to General *Monck* (being ſent for by him, and that when the Earl of *Glencarn* was under treaty with him, if not after the treaty was concluded, which he conceives will not be denied) and the Defendor being their priſoner upon demand by his capitulation with General Major *Dean*.

It is alleadged firſt, That a Priſoner ſhould go in company (being commanded with, and to thoſe whoſe priſoner he is) is nothing like a crime.

2. Though that had not been, yet he alleadges in anſwer to that member of the alternative, anent his furniſhing of ſeveral peeces of great Cannon to *Alured* Governor of *Air viz.*, That the Defendor and all that was his, or in his poſſeſſion, being under the abſolute power of the Uſurper, they might command him to go or to call him where they would, with whom to go along, or to bring whatever he had to them, had it been on his back had he been able to carry it: And that cannot be imputed to him for any crime (otherwiſe who ſhould be innocent) when ſubdued; muſt they not give to their Enemie of their goods whatever he will have? and who in *Scotland* ſhould be innocent? behoved not all to bring to them; that is in effect did they not take what they pleaſed: But as for my voluntary going or joyning in action with *Twiſleton*, or any of the others named in their ſervice, the Defender abſolutely denys the ſame.

Item, *For his taking and releiving priſoners*, *Non relevat*, except the Priſoner were ſpecially condeſcended on: Specially relieving of priſoners, is not releivant to infer any crime, but on the contrary is a good office to the perſons and parties (except it is libelled that he as Officer under the Engliſh ſervice took and releived priſoners, which can never be made appear, whatever the ſame might import. But the truth is the Defendor medled with no ſuch things, and the Defendor ſhall truly relate the point of fact which he conceives hereby to be meant, which is as follows, The

Defendor hearing that his Isle and County of *Rosneith* was pillaged, and going up the River *Clydde*, the boat wherein he was being followed by another boat, and the Defendor having asked what they were, they alleadged they did belong to the Earl of *Glencarn*, but could shew no warrant, and thereupon the Defendor having some suspicion that they were rather Robbers then Souldiers belonging to the Earl, and fearing that General *Monck*, whom the Defendor was then going to, and whom he had never seen till that time, might get notice thereof, and make use of the same as a snare, the Defender advised them to secure their money and arms in the hands of one of his Servants upon assurance that the same should be delivered to them, after he should be certified what they were; and thereafter recommended them (fearing to incur the danger of a private prison) to the Carison of *Dunbarton*, not under the notion of Souldiers under the Earl of *Glencarn*, but as common Delinquents for injury done to the Country. And at his return after a few days (being tender that they should incur no danger) procured their releasement, and their names was never enrolled as prisoners to be exchanged; and according to his promise caused redeliver their money and arms

As to the following member of that Article, *viz. That the Defendr took pay from the Usurper for a company of Scots under them, and in their service*

Adhering to the several exceptions against the releivancy of the propositions of the Dittay, and exceptions against this whole Article, in the beginning of the answer thereto; specially that it is not condescended under which of the Acts libelled on this member is subsumed, till which be done the Defendor has reason to deny that it falls under any of them. Neither is it releivantly libelled, to infer any crime unless it had been libelled, That the defender, having commission for that pretended Company for the English service

vice at that time, had levied or kept that Company, inroled their names as a formed Company under the Engliſh and their Regiments, and engaged them to the Commonwealth and their ſervice; becauſe theſe are required in a Souldier in any ſervice.

1. That he be *Relatus in numeros*, that is to ſay inrolled, *per lex eod. 42. T. de Teſt. milit.*

2. *Ut præſtet Sacramentum*, that is, that they gave the oath *ex milit 11. F. eod. & viget 2. cap. 6.* or that the defendor had imployed them in the Engliſh military ſervice, or in execution of their orders, all which the Defendor abſolutely denies, they never having been inrolled, given any oath or Engagement, or imployed in their ſervice, as is ſaid.

But on the contrary, and truth is, there uſes to be in the ſaid Shire, and all other places in the Highlands in broken times Watches to keep off depredations, maiſterful reifs, and other oppreſſions amongſt the Country people, themſelves and their neighbors in ſuch times: And accordingly in the year of God 1653. or thereabout, the Shire of *Argile* not being able to entertain their Watch, and pay Seſs alſo (not being as yet well planted after the burning) General *Monck* was prevailed with to help to entertain the ſaid Watch (likeas at the ſame time alſo ſeveral other Shires bordering upon the Highlands, as *Inverneſs*, *Pearchſhire*, *Aberdeenſhire*, *Sterling*, *Dunbarton*, all of them had Watches the ſaid times, and allowance therefore from the ſaid General *Monck*) who within two moneths did withdraw the ſaid allowance from the ſaid Watch of *Argileſhire*, becauſe they refuſed to engage againſt thoſe who was then in the hills under the Defenders Son and others, whom the ſaid General *Monck* alſo alleadged that they favoured; and thereupon withdrew his help and allowance for the ſaid Watch, and ſpake of the Defender what his Grace pleaſed.

And to evince that this was nothing but a Watch, the men were not in a formed Comany, but ſeveral Gentle-

men in the Shire had the ordering of several numbers of them at convenient and needful places of the Shire, with proportionable entertainment, and without subordination as ordinary Souldiers; All which is notour, and if need be the Defender offers to prove. And the Duke of *Albemarle* it is hoped will remember how much offended he was that the Defender would not engage the said Watch against the said Lord *Lorne* and his Parties, and what prejudice he did still entertain against the Defender upon the said publick account. As also Colonel *Robert Lilburn*, when the Lord *Lorn* and *Kenmoir* went to *Kentyre* in the year One thousand six hundred fifty and three. The said *Lilburn* immediately upon the notice thereof having come with a considerable party of the English Army to *Dunbarton*, and sent to the Defender to meet him, and to go along with him in *Arguile* towards *Kentyre*: If the the said Colonel does not know and perfectly remember that the Defender shunned the meeting, and would not go, whereupon he returned back with the forces after he was at the length of *Lothlomond*, whereupon the defendor humbly craves that he may be urged to declare; As also that the Counteſs of *Balcarras* may be examined, if the defendor did not assist her and her Husband in their passage through *Arguileshire*, as they were going to a meeting at *Finlarig*, for the business in the hills, in the year One thousand six hundred fifty and three. Neither can it be alleadged That the defeuder or any of his people did the least prejudice to any person or party that professed to be for his Majesties service; albeit if he had been so disposed, he had and might have had several opportunities to have done the same.

As for the Member following, *That the Defendor called the actings of His Majesties Forces against the Usurper, Rebellion.*

— It is most general, neither condescending on time nor place

place, and therefore irreleivant and inept, but when condescended on he nothing doubts, but that shall appear he spoke no such things, nor had he ever any such construction thereof.

As to the last deed in the said Article, *That the Defender in* anno *One thousand six hundred fifty and four, took upon him power to bring off such as was in that service, and to give remissions therefore, and particularly to* John Mac Dowgall.

It is general neither condescended on time nor person brought off, and therefore inept, and irreleivant. And if it be meant only of the person named, *viz. John Mac Dowgall* of *Dumslich*, it will never be made out that he was in that service, when the Commissioner his Grace, and the Earl of *Glencarn* was in the field; nor that ever there was a Remission granted by the defender to him or any other in relation to that service.

As to the Twelfth Article and first member thereof, anent the defenders *countenancing and assisting by his personal presence the Tyrannical and Treasonable Proclamation of* Richard *the Usurper and Protector of His Majesties Dominions at the Mercat cross of* Edenburgh *and* Dunbarton.

The defender is so notoriously innocent of this Member of the Article, that he might with much confidence (in place of all other defence) simply deny it. But he will do no more for defence and clearing of his innocency, That where he is to propone his defence of *alibi*, that there month and day must be condescended on, whereof none is condescended on in this member of the Article; and till this be condescended on it is inept, and the defender ought to be assolzied therefrom; But the days of the said proclamation at *Edenburgh* and *Dunbarton*, being condescended on, the defender offers him to prove that during these days he was *alibi*, and neither at the City of *Edenburgh* nor *Dunbarton* all these days.

As

As to the ſecond member, *anent the Defenders procuring himſelf elected a Commiſſioner for the Shire of* Aberdeen; *and accepting a Commiſſion from them, to* Richards *pretended Parliament, and ſitting and voting therein as a Member of his pretended Houſe of Commons.*

That the Engliſh Uſurpatiou was one of the moſt horrid Uſurpations that ever has been in *Europe*, againſt all Divine and Humane Law, againſt the moſt uncontroverted right of the moſt Illuſtrious of Kings, our dread Soveraign, and his moſt Royal Father of Eternal glorious Memory, none of common ſenſe or honeſty will controvert: Next the ſaid Uſurpers having nothing but an unparalel'd, unjuſt detention of that power, whereunto no manner of way they had the leaſt right, or any title whatſoever; but in place of a title, armed Violence and Force: The onely mean (for title they had none) whereby they both *de facto* attained, and violently detained that poſſeſſion, unjuſtly, of that power whereof the onely right was, and poſſeſſion ought to have been our dread Soveraign. Whoſoever by Arms, Counſel or otherways, aided or abetted that armed Force, in eſtabliſhing *de facto* of that power in the perſons of the Monſters of men, and ſo in ſetting up of that abominable Uſurpation, that he is guilty of the higheſt Treaſon, is heartily acknowledged: But the Uſurpers having treaſonably thruſt their and our Soveraign, his Majeſtie, from all poſſeſſion of his juſt right, and having taken upon them the Supreme Power; and being poſſeſt (though moſt unjuſtly) yet moſt peaceably therein, and keeping the ſame by force, as they had taken it, the caſe then became moſt ſingular, as to what the poor oppreſſed ſubjects under their force might do, *hoc rerum ſtatu poſito*, in this ſtate of affairs wherein the Uſurper had treaſonably put them *Luck Lama*: and moſt accute *Juvis*,

Conſult.

Conſult. Eccleg. 6. membran. in L. 3. de Officiis pratorum obſerves learnedly, that *Diſtinctio fieri debet inter perſonam ejus qui Magiſtratum gerit (cum tamen jus ad Magiſtratum non habeat) & ipſum Magiſtratum quam geſſerit, perſona enim ejus eſt privata hic publicus, & in publicis non tanta perſonæ quam utilitatis publicæ habenda eſt ratio, ut enim tutela ait, Cicero, p. 1. Offic. ſic procurato rei pub. ad utilitatem eorum qui Commiſſi ſunt non ad eorum quibus commiſſa gerenda eſt, & ſapientes deficiunt nihil aliud eſſe imperium niſi curam rei alienæ ut ait Amicanus Marcellinus lib.* 29. that is, *ipſius rei pub.* ſo *Licklama* diſtinguiſhes betwixt the perſon of him who unjuſtly *de facto* Magiſtracy (whoſe perſon is ſtill but in effect private, and in the caſe of that uſurpation a Traytor) and the Magiſtracy which he carries, which is publique.

Likewiſe, it would be diſtinguiſhed betwixt Acts concurring with the Uſurper, transferring *de facto* in his perſon the power he uſurps (which are treaſonable againſt the lawful Soveraign) and acts, whereby the oppreſt ſubjects make uſe of the power now uſurped, wherein the utility, not of the Uſurper, but of the ſubjects is reſpected, as *Lucklama* obſerves, *ubi ſup.* And then *Grocius, lib. 1. de Jure belli & pacis, cap. 4. num.* 15. ſpeaking *de juvaſove imperii*, of any unjuſt invades, while his poſſeſſion remains unjuſt, ſays, the acts of power is binding for the good of the Commonweal; and becauſe it is probable the lawful Governors will is, rather the Vſurpers command ſhould be obeyed, or take effect, then that Laws and Judgements ſhould fall in confuſion in their terms, *Reſtat ut de invaſore imperii videamus nunc poſt quam longa poſſeſſione vel pacto jus noctus eſt, ſed quam diu durat in ju? æ poſſidenda cauſa & quidem dum poſſidet actus imperii quos exercet vim habere poſſunt obligandi non ex ipſius jure (quod nullum ſed ex eo quod omnino probabile ſit eum qui jus imperandi habet ſive eſt populus ipſe, ſive Rex, ſive Senatus te male int rim rata eſſe quæ imperat quam, legibus Induſque ſub talis ſumman induci confuſionem:* and *Leſſius*, who is one of the Authors *Grocius* cites upon the place, ſays,

ſays, in the place cited, *viz. Lib. 2. de Juſticia & Jure, cap. 29. dub. 9, F. 37.* That *Tyranni uſurpatione poteſtatis mandatis obtemperandum propter bonum commune*; which is, that the Tyrant and Vſurper is to be obeyed, even from the Law of Nature, for the publique good, in ſuch a ſtate of affairs; and addes, *alioqui omnia eſſent plena latrociniis & furtis*: That is, all would be full of Robberies, Theſts and Confuſion in that ſtate of affairs, becauſe of the Vſurpers force, the uſe of no other Government can be had; ſo that the neceſſity of the benefit of Government for the good of the ſubjects or Commonweal (eſpecially in what relates *ad reipublicæ ſtatum*, in things neceſſary for the ſtanding of the Commonweal, or to evite the ruine thereof) and the interpretative and preſumed conſent thereupon of the Prince, who has the right to the Authority which the Vſurper has uſurped, but is excluded by the Vſurper from benefiting the ſubjects by it himſelf for the time, are the two grounds whereupon the making uſe of the power now in the hands of the Vſurper is founded, as is ſaid: Whereupon it is ſubſumed, that in our caſe, the Invader and Vſurper *Oliver* having violently taken upon him the power, after he had put his and our Soveraign from the poſſeſſion thereof, oppreſt by his Armed Force this Nation (and amongſt others the Defender;) and *Oliver* having kept the poſſeſſion all his time, and *Richard* continuing the ſame, the benefit of that power (which now he had uſurped, and whereof he was in poſſeſſion) was, as always it is, ſo neceſſary for the ſtanding of the Commonweal, that without it men become but as fiſh in the ſea, the leſſer a prey to the oppreſſion of the great; but eſpecially, the ſaid *Richard* having called a pretended Parliament, and commanded the Shires to ſend Commiſſioners thereto: Meetings and Repreſentatives of the Nation, as they are of great uſe at any time, for treating common affairs of common conſent, ſo tranſcendently at that time, for moderating the Arbitrary Tyranny of a Vſurper; and that not being able to expugn his force, they might by ſtrength of Common-Counſel, overcome

overcome and perſwade his reaſon to things abſolutely neceſſary, for the ſubſiſtence at leaſt for the preventing the ruine of the whole body of the Kingdoms, and of his Majeſties Leiges therein, as was the ſtopping that miſerable union, which the Defender knew that it would be, as it had been before, at even other Parliaments, ſo at that ſtrongly attempted, as indeed thereafter it was; which union was that Vorax, wherein our Religion, our ancient Government Monarchick in his Majeſties Perſon and Family, and the intereſt of Nobilities and our Liberties, were wholly ſwallowed up; and under pretext of being united, we were really enſlaved to that pretended Commonwealth: The eaſing (if they could not perſwade him to the taking off) of the maintenance and Seſs (which upon *Scotland*, was ſix triple more then the proportion of *England*, and in it ſelf ſo heavy, with the Exciſe and other publique burthens, laid by the Vſurper on it, that more was exacted in one moneth, then his Majeſties Royall Predeceſſors would have impoſed or taken of Taxation for an age, ſo that the Countrey could not ſubſiſt under it;) as alſo taking off ſome of the Forces under which we were kept in bondage, if that at leaſt could have been obtained: The prevention of the alteration and change of our whole Laws (which was vehemently threatned) yea, and in general, the confounding and (*dolo optimo*) circumventing and defeating of the counſels by which the event proved, it was more hopeful and eaſie to overcome that force, then by might or power. And as the liberty of the Election of the Members in *England*, at that time of *Richards* Parliament made ſervice to his Majeſtie in it, hopeful to all his Majeſties friends and loyal ſubjects; ſo was it no ſmall encouragement to the Defender to go there for the ſame end, and at the meeting in the Committee of Scots affairs, and ſeveral other meetings, when they were upon the debate of the ſaid union, the Defender (of purpoſe to ſtop the ſame) did propone, that there could be no union, except it were agreed, that we might en-

joy our Religion in *Scotland* without alteration, as it was eſtabliſhed by our own Laws; and that we might be ruled and judged according to the ſame Laws, and except our Seſs were proportioned according to theirs in *England*: All which concerns the Defender knew would never be granted, and were indeed ſo utterly improbable at that time, that the propoſition thereof was conſtrued for no other end, then for the end aforeſaid, to ſtop the ſaid union: Likewiſe, it did ſo well ſucceed, as in effect it did obſtruct it (as the ſeveral perſons of quality that were preſent can, and if need be, will declare;) and at that meeting, the actings and uſurpation of the Vſurper *Oliver*, and the oppreſſions of that Army were of purpoſe much called in queſtion, to make that Government and them odious, which accordingly happily followed, and ſuch a breach and confuſion amongſt them was made, that their affairs thereafter could never come to any conſiſtency, which made conſiderably and evidently way to his Majeſties happy and glorious Reſtitution: To all which joyning, That the call and command of the armed Force, has *Parenes neceſſitatem*, a neceſsity of obeying lying upon perſons under their power; it will follow from what is alledged out of theſe abovecited authors, founded ſtrongly on reaſon, the Defender in that ſtate of affairs had neceſsity and ſome obligation, to go and eſſay what could be by counſel, wiſdom and prudence (ſince now there was no ſtrength nor might left) effectuate for the ſtanding, at leaſt, to evite the ruine of the Countrey, in the particulars abovementioned, and others of that nature; at leaſt, the Defender, as all of us, was under their force, and for eviting of his own and the Countreys ruie, *habuit Parenes neceſſitatem*: and by conſequence there was no deſign of Treaſon therein; but by the contrary, moſt loyal intentions, upon good ground of hope, and very probable appearance: And therefore it is hoped, the Commiſsioners Grace, and the Eſtates of Parliament, will not finde this member relegant, to infer ſo high a crime againſt the Defender

fender, *(bot maxime attento)* that beſide publique ends, it was even a neceſſary ſelf-preſervative act, for the Defender had ſeveral other things of perſonal intereſt, as that, that they had ordained him to pay to them about 4000 l. *ſterling*, for alledged few duties (aught land, and in time coming ſo much, that both joyned, he was not able to bear) and if need be, it is offered to be proven, and that he was moſt rigorouſly perſecuted for the ſame; not onely threatning to uſe real execution againſt his Eſtate, but alſo to impriſon his perſon.

For eviting whereof, he behoved to go at that time to *London*, and could not have his perſon ſecured from arreſtments there, but by going in Commiſion: And it is known, that his Majeſtie is ſo gracious, as in not a few, to excuſe what they did of that nature, to evite (though but their own perſonal ruine) not imputing it to unfaithfulneſs in them at ſuch a time; according to whoſe glorious and imitable example, it is (with much confidence hoped) that the Commiſsioners Grace, and Honourable Eſtates of Parliament, will have a favourable conſtruction of what the Defender did in that particular, being neceſsitated thereto, both for publique and private intereſt, without any deceit or fraud, either in the intention or event, there being nothing at that time, while the Defender was there, done for confirming the Vſurpation, or excluding his Majeſties intereſt.

Likewiſe, it may appear, that it was onely the concourſe both of publique and private intereſts and neceſsities, aforeſaid, that moved the Defender to go at that time; becauſe, though he was deſired oftimes before to go, yet he ſtill refuſed till then: He was one of the laſt that went to that, being the very laſt pretended Parliament under their power; not till long after that Commiſſioners had gone for the Nation for ſeveral years, and that all had ſubmitted to their

Conſtitutions, and were of neceſsity made uſe of as Laws for the time.

As for the aggravations of this Member, and to the firſt, *That becauſe of the Defendants Nobility, he was incapable to have been elected, at leaſt, might have refuſed.*

It is anſwered, That it is notor, Nobility was not then reſpected at all, nor was any ground of excuſe, the meetings to the elections being commanded to all, as heretofore (and ſo Noblemen and others heretofore met promiſcuouſly through all the Nation) as is notoriouſly to all known.

And whereas it is libelled, *That he had not his reſidence within the Shire:* it ought to be repelled as irrelievant, becauſe it is true, and was known to the Uſurpers, and their Miniſters and underlings, that he had land within the ſaid Shire, and that conſiderable: ſo that he could not decline the ſaid employment, without prejudice, the will and luſt of the Vſurper at that time being uncontroulable, and tied to no rules of law or juſtice.

And where it is inferred, *That ſitting and voting in that pretended Parliament, he acknowledged his Majeſties power and intereſt to be in the Vſurpers perſon.* It is anſwered,

1. He acknowledged the ſame no otherways, but as all the Kingdom did, to wit, *de facto*, ; for *de facto* the Vſurper had taken or poſſeſt himſelf of the power, as his Majeſtie is pleaſed to ſpeak of it, in his Proclamation anent commerce with *Portugal*, in October laſt, and had detained the ſame for a long time: But neither the Defender, nor any other loyal ſubject, ever did or will acknowledge, that *de Jure* the ſame belonged to him, or that he had any juſt right or lawful title thereto (as alſo *Leſſius* ſays in the above-written place, ſpeaking of them that ſeeks from Vſurpers that uſe of Government, whereunto he ſays, they are holden

holden in and obliged, once taking on them the Government, (though sinfully and unlawfully:) they seek the benefit of it, says he not absolutely, but under a tacit condition, *viz.* If the Usurpers will take upon them the Government, *Petunt* (saith he) *sub tacita quadam conditione si velit se pro principe gerere*, speaking of the Usurper, and that the Usurper would not give the use of the power he had taken upon him, but in the way he pleased, was his crime which he continued during his usurpation. In respect of all which, it is humbly craved, That the defender may be assolzied from the crime of Treason libelled thereupon.

Like as for the defendors further clearing in this particular, it is humbly desired that certain Ministers and others above exception, whom the defender shall condescend on may be examined, if after his return from *England* in *Anno* 1658. he did not express with great joy his hopes That business in *England*, did tend toward Hjs Majesties advantage.

Item, That a Commission be directed for examining Sir *Anthony Ashly-Cooper*, and several other Englishmen above all exception, how the defendor expresst himself in private anent his dissaffection to that Usurpation during his being there the time of the said Parliament, even though to his very great hazard at that time.

Item, That certain persons upon whose names also he shall condescend may be examined, if the defender to their certain knowledge the time of Sir *George Booths* rising (which fell out immediately after the defendors return from the said Parliament) did not put himself out of the way, being informed that he was to be secured, and thereupon delaid his journey to *Caithness*, and so readier to have laid hold upon any opportunity that should have offered for His Majesties Service and restitution; that time being the most probable that ever offered after *Worcester*.

As for the precept of Twelve thousand pound *sterling*, which

which is alleadged the Defendor got from the Uſurper.

It is anſwered, The Defendor did indeed obtain a precept, but not as a reward of any ſervice (which he never neither did, nor deſired to deſerve from them) but for what they had wrongfully intromitted with, of the half of the Exciſe of Wine and Strong water (whereunto the defendor had right by Act of Parliament, before they had any power in *Scotland*.)

And as to the Thirteenth Article, Firſt, For the whole Article, it is not conſented on what Act of Parliament, the ſame conſiſting of three different members is ſubſumed, and till it be condeſcended on, there can be no proceſs thereupon.

And as to the firſt member thereof, anent the words alleadged ſpoken at *Innerary*.

1. No time condeſcended on, and therefore the libel in that part is inept for the reaſons afore mentioned, for which a criminal dittay ought to be ſpecial in the time at leaſt year and month.

2. Whereas it is libelled, *He rebuked the Miniſters for praying for the King*; in the words libelled, *or ſome ſuch like words*; *Non relevat* as to the Miniſters, except the perſons were condeſcended on whom he rebuked.

3. *Non relevat*, *Some ſuch like words*; ſome ſuch like being moſt general, except the words were particularly libelled, alleadged to be ſuch like, whereby the defender might adviſe his defences, and alleadge why they were not ſuch like, as he would, if any words ever he ſpoke were condeſcended on. For the truth is he never ſpoke any ſuch words: And was ſo far from rebuking any for praying for the Kings Majeſty, That after the defeat at *Worceſter* (which is the general time libelled, wherein he ſhould have rebuked the Miniſters for praying for the King) he himſelf cauſed continual praying for His Majeſty both in his Pariſh Church and family, yea even in preſence and audience of the Engliſh when they came there, though

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it was to his great hazard ſo to do.

As to the ſecond Member anent the words libelled and alleaged to have been ſpoken by the defendor at *London*, *That he wondered how the people ſhould be ſo mad as to call home a Family whom God had rejected, and would never reſtore*; or ſome ſuch like words.

Firſt, This is alſo general, neither time, that is, year nor moneth, nor particular place condeſcended on.

Secondly, It is libelled, *That it was in the preſence of perſons of quality*, they ought to be condeſcended on.

Thirdly, In ſo far as it is libelled the defender ſaid *The people was mad to call home His Majeſty*: It is general and inept, not condeſcending what people, and what was the occaſion; if there was any motion made of calling home the King, whereupon that ſhould have been ſpoken, and among whom it was: And *Damhanders cap.*30. *prax. com. num.* 4. and others ſays, *A criminal Dittay ſhould be moſt clear and contain, Omnes criminis patrati qualitates, lib.*30. *F. de accuſ. & Bart.* and others, *ibid.* That it ſhould contain all the qualities of crimes alleaged to be committed.

Fourthly, *Some ſuch like words*, *Non relevat*, except the words were ſpecially condeſcended on, which if they were the Defender would alleage and evince they were nowiſe ſuch like; for the truth is, he never ſpake any ſuch words, but on the contrary did all that he could there to make way for His Majeſties happy Reſtitution; as has been at length cleared of before.

And was a very ſuſpected perſon, in ſo far as in the year One thouſand ſix hundred fifty ſeven, *Oliver* was ſo jealous of the Defendor, That he commanded him to ſtay at *London*, and not to return to *Scotland*, till his affairs (as he was pleaſed to expreſs) were ſettled: So that not without great difficulty, by the mediation of the Lord *Brongbil* and *Charls Fleetwood*, he obtained his liber-

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ty; whereupon the Defender desires the said *Charls Fleetwood* to be examined, which he also desired at *London*. And not onely was suspected as odious to the English for his known affection thereunto: As is notorious and has also before been expreſt.

As to the third member of the said Article, anent the alleadged speech in *Mastertones*.

1. Neither the year nor month condescended on, and therefore general as to the time, and inept.

2. As to the first member thereof, *That he would own any thing he had done*.

First, It is exceedingly general, and not releivant, except what were the things he had owned were specially condescended, and what time, year and month; it is an unparalleld generalty, and therefore till made special, no process thereupon.

Secondly, It can import nothing in common sence wherein to own a thing is to acknowledge it for a mans own, *But what he had acknowledged to be his own whether word or deed, he would yet acknowledge*, which is an expression of ingenuity, and no crime, and this being the received sence of owning, the word cannot be strained to any other sence, or if occasion should be taken so to do, and that another sense could be put on that expression, yet being *more interpretatio capienda est*, the most-being interpretation is to be taken. *Perd. ea quæ S. I. 1. F. de reg. Iuris*, as being both justest and safest by that Law. And in ambiguous speeches, or such as may receive two sences, every man is the best expounder of his own mind, and his interpretation ought to be admitted, *per Leg. in ambiguiis F. de reg. Juris* and other laws. But the sense aforesaid is so plain that there is no place for caption.

As to what follows in the said member, *That if what he had owned or done were to do, he would do it again, albeit he had known that all that has been would have come.*

1. As is alleaged against the first part of this member, this is exceedingly general, but as to the time and month he should have spoken it on.

2. As

2. As to what the things are that he would doe if they were to be done, and that time the things were done or owned to be done, on that the saying that he would doe if they were to doe is a crime.

3. What were those things in particular, that are understood or may be subsummed under the generall of all things that has comed to passe, whereupon it may be inferred, that that were a crime to the Defender to have said, that notwithstanding of them he would doe what he had done if that were to doe; and therefore the Libel in this part of the member is also general, obscure and inept: And to evince the ineptitude of this generality, suppose the Defender were thus indicted; You are indicted for all that ye have done the times by-gone preceeding your being in *James Mastertonnes* house after your coming for *London*, were not that ditty without all controversie Irrelevant? Then is it not also Irrelevant to be indicted for owning in general that he had owned, or saying in general, that he would doe that he had owned during that time if that were to doe again, without any further particular condescendance.

Like as 4. There is a very clear and obvious and benign sense these words may have (if ever he spake, as he truly never remembers that he spake any such words, *viz.*) that if it had been possible that times could have returned, and actions to be done under the same circumstances and representations they had then, it is probable these same might be the Defenders actions again, though he had known that had comed thereafter, not having

connexion with or neceſſary dependance on theſe actings, each does not ſo much as import his preſent thoughts or approbation thereof, but is very conſiſtant with a preſent diſapprobation of the ſame: And is it not ordinary to ſay, that if ſuch times were as has been, or ſuch motives or circumſtances of actions as has been, that it is very like I would be engaged in them as well as others, or as I have been my ſelf? And yet to ſay with great conſiſtance I ought not ſo to doe, like as truly it is known, and if need be, is offered to be proved, that the Defender, on the juſt contrary, had ſaid to one Counſellour of *Cromwels*, and to many other famous Gentlemen, that things had been done wherein he would have been very far from engaging in, if he had ſeen what followed, which was the product of the corruption of evill men, that had abuſed what was well intended, for accompliſhing of their wicked ends and (till they brake forth and could not be reſiſted) unknown deſignes. And the Defender hopes the ſenſe aforeſaid is very clear, and even though it were not ſo obvious, yet *Rapienda eſt occaſio quæ benignum præbit reſponſum L--- Rapiend.* 168. *F. de. reg. Juris*, That is any occaſion ſhould be even reft (as it were, though there were ſome violence done to the words) for a benign interpretation, and therefore by all meanes that interpretation of the words that may ſeem to inferre a crime ought to be eſchewed, or if the word might be drawn to any other ſenſe, yet *In dubiis benigniora preferenda ſunt*, (as has been ſaid) in ſpeeches dubious,

bious, the moſt benign ſenſe is to be preferred *pret. ſemp. 56. F. de reg. Juri*; or where words are obſcure, or may ſuffer two ſenſes, the parties own interpretation is to be taken, as the beſt intepreter of his own mind; *Per ea quæ ff. 1. F. de reg. Juri*: And *odia ſunt reſtringenda favores ampleandi*: what is odious (as that which may inferre a crime againſt any) ſhould be reſtrictedand favour amplified; and in generall, the Judge is alwayes to be more enclined to abſolve then condemn, and ſo conſequently take the ſenſe that may abſolve, rather then that which may condemn, *Leg. Corianus F. de oblig. & 47. act.*

5. The Doctors ſay, that *voluntas & propoſitum delinquentis diſtingunt facinora per legem expreſſam Leg. qui in Jur. 53. F. de furtis in præ*: That is the will and purpoſe of him that commits a crime, diſtinguiſheth it, but *velleitas*, or *voluntas inefficax*, as it is called, not a will, but a would is no purpoſe to doe, and can be the cauſe of no crime, eſpecially being about things paſt, and qualified with an impoſſible condition, if things already done were to doe (which is altogether impoſſible) that a deed done can return to have a new being and ſo to be done; and even there is ſome preſumption of that miſtake may be in this from the very place libelled, in which it is alledged to have been ſpoken, it being ſuch as it is not improbable, that men may be very apt to fail both in judgement and memory, and ſo both wrong themſelves & miſconſtrue others. And as for the aggravations that follows, that by ſpeaking theſe words

the Defender took upon him by outward ſucceſs, to give judgement upon the ſecret Counſell of the Almighty. 1. As it is in nowiſe true that the Defender ſpoke any of the words libelled, ſo this does (as he humbly conceives) in nowiſe follow upon the words immediately going before alledged ſpoken in *Maſtertounes*, *viz:* that the Defender owned what he had owned, or would doe the ſame if it were to doe, for that is not any Judgement given of any hidden counſels of the Lords, but in expreſſion at moſt of his own actions. And as for the words before theſe, albeit he had been ſo preſumptuous as to ſay them (as he bleſſed the Lord he never was) yet it is not libelled that any thing that is therein alledged to have been ſpoken, either at *Innerarrey* or *London*, was ſpoken or inferred from providence and ſucceſs: For the Defender bleſſes the Lord, he has been otherwiſe taught, then to uſe (or rather to abuſe) ſo Turkiſh an Argument, and which the Lord has by his Majeſties happy reſtitution ſo ſignally refuted.

And as to the laſt Aggravation, that the Defender thereby hardned others, ſuch as otherwiſe was ill diſpoſed, in their wicked courſes towards his Majeſty, it is indeed a ſad reflection upon others herein not called however. 1. It is ſo general both as to theſe others and their courſes, that it cannot, and the Defender hopes it ſhall have no weight, eſpecially conſidering that 2. The Defender oppones his defences of before alledged, againſt all the members of this Article, whereby it

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is clear, that as they are libelled they can inferre no ſuch thing, in reſpect of all which the Defender ought to be aſſoilzied alſo from this Article of the ditty.

As to the laſt Article. 1. It is not condiſcended under which of the Acts of Parliament libelled on it is ſubſummed, and till then it is ineptly libelled, and there can be no proceſs thereupon: Moreover the Defender has the teſtimony of his own Conſcience, yea & of an higher, that nothing libelled therein is true, albeit if he had ſaid that the Uſurpers hazard was great from his Majeſty, and if his Majeſties deſignes took effect, they were ruined, the ſame were notour truths, and it ought to have been ſo; that is, it ought to be, & it was good, they were in hazard from his Majeſties deſignes; and it was moſt juſt, that his Majeſties deſignes ſhould take effect to their ruine. And what crime could be in ſo ſaying he cannot apprehend; however he never ſpoke any ſuch words to *Cromwell* or *Ireton*, which *Ireton* he never ſaw with his eyes; and did far more abhorre the leaſt thought of giving counſell to challenge or queſtion his late Majeſty upon his precious Life, and his Innocency ſhall reſt confident, abſolutely to deny the ſame.

And as to the laſt part of this Article, whereby it is libelled that in *Anno* 1649. in face of the Parliament then ſitting, he told that the Uſurper *Cromwell* had told him, that *England* and *Scotland* would never be at peace till the King were put to death. The Defender adheres as to this part

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to the generall exception againſt all this Article.

That it is not condiſcended under which of the Acts of Parliament libelled on it is ſubſummed, till which be done there can be no proceſs; and if it be intended that it be ſubſummed under the 43: Act 2. p. *Jam.* 1. and the 134. Act Parl. 8. and 10. Act and 10. Par. and 205. Act. 14. Parl. K. *Jam.* 6. all theſe Acts, as both by their titles and tenours, and by *Skeine* in his Index on the words leaſing makers appears; and it ſeemes by their conjunction in this libell, they are underſtood alſo therein of lying and ſlandering his Majeſty, and his Progenitors, and the words libelled, though very horrid, yet ſeemes to be of another nature. And 2. to that Act 205. P. 14. *Jam.* 6. whereon only any thing can be ſubſummed againſt him for concealing and not apprehending. 1. It is generall as to the time when *Cromwell* ſhould have told it to him, and therefore inept till the time be condiſcended on, which muſt be, eſpecially ſeeing if it be not condiſcended on, to have been after the Ingagement was broken; nothing can be ſubſummed on the ſaid act thereupon againſt the Defender, nor on his not apprehending him, for he was not holden thereto by that act expreſly, except (according to Law) it had been in his power: But ſo it is, it is known that at that time it was not in the power of the whole Kingdome to apprehend him, whether his victory or ſtrength be conſidered, or the Kingdomes low and weak condition, at that time, wherein they lay open to ruine by him, if the Lord had not reſtrained him more nor

their

their power could effectuate; and as to the concealing and not revealing, the Defender ought to aſſoilzied, becauſe by the expreſſe words of the act, that revealing is declared to be ſuch a revealing to ſome of his Majeſties Privy Counſell, or ſome under Officer, &c. as that there through the Authors of ſlanderous ſpeeches may be called, tryed, and puniſhed; but that cannot be ſubſummed, except it were ſubſummed, that the ſpeeches were ſpoken before witneſs, otherwiſe could not have been proved, and without probation could not have been ſo urged, as that ſentence could have been given thereupon, and the Author puniſhed, according to the words of the act, (which is alſo according to Common Law, and which is hereafter cleared); like as if the word thereafter ſhould have been found treaſonable, and the Defender not being found able to have proved them, he ſhould have brought himſelf under the crime of treaſon, for accuſing another of treaſon, and not being able to prove it, and therefore could not be holden ſo to do: As alſo albeit the Defender had heard any ſuch words as is libelled (which he altogether denies) and that before witneſs, yet through his revealing thereof the Author could not be tryed or puniſhed, for it is noturly known it was above the power of the Kingdomes, at that time as ſaid is, or for many yeares thereafter, to puniſh him; and therefore the Defenders not revealing cannot be ſubſummed upon the ſaid act of Parliament, to inferre the pain contained therein, or related unto.

Laſtly,

Laſtly, the pains of the ſaid Act, and other Acts before mentioned together therewith, is not the pain of treaſon (as has been oft before evinced) and therefore the Defender cannot be convened for treaſon, or the pain thereof upon the ſaid Acts, but ought to be aſſoilzied therefrom.

But if this member of this Article be intended to be ſubſummed under the laſt part of the propoſition of the ditty, whereby it is alledged, that by Common Law and practice of this Kingdom, all concealers and not revealers of any malitious purpoſe of putting violent hand in the ſacred perſon of his Majeſty, or purpoſing of killing and putting him to death, are guilty of treaſon; the Defender proteſting his Innocencie in never concealing any ſuch purpoſe, nor the words aforeſaid libelled (which he abhorres) he is ſo far from juſtifying thereof, judging the horrid murder of his Majeſty to have been the very ruine of our peace and happineſs; yet as to the releivancy of that part of the propoſition, in ſo farre as is founded upon Common Law and practice only: The Defender becauſe of the preparative repeats what was before alledged in the anſwer to the propoſition, in that part thereof; and adds further, *In crimine leſæ Majeſtatis*, in the crime of leſe Majeſty, *Num ſciens tractatum proditionis contra principem vel patriam & illum non revelans ſit puniendus pœna mortis*, That is, whether he that knows a Treaty about treaſon againſt his Prince and Country, be puniſhable by death; *Clarus l.* 5. *ſ. fuſ. pract. crim. queſt.* 57. ſayes, that many hold he is puniſhable

puniſhable by death: And that *Cognol.* in his *lib. Culpa caret F. de reg. Juris num.* 2, that it is the common opinion, citing *Alciat. in lib. facere F. de verb. ſig. & m. l. Bona fide, num.* 20. *F. de paſſ. & in lib.* 4. *of Cato num.* 30. *F. de verb. oblig.* related alſo by *Gigas, de crimine leſæ majeſtatis fol.* 180. *num.* 10. *Roll. Conſ.* 88. *num.* 10. *lib.* 2. *Carel. prac. crim. fol.* 253. *num.* 29. ſaith, that all others follows this opinion: and *Baldus* cries out in one certain Counſell, that becauſe *Bartol* held otherwiſe, therefore his ſoul for that as a crime is tormented in hell, where it is clear, that even by *Clarus* acknowledgement (which is very high Treaſon) is not Treaſon by the common opinion of the Doctors, according as is aſſerted by the famous Authors he cites, and whom he contradicts not therein. 2. And *Clarus* nothing contradicting, but this is the common opinion, albeit he be of another with *Bartol*; that is capitall to conceal and not reveal, yet it is only in two caſes, to wit, *In tractatu qui fiat contra ejus perſonam vel ſtatum*: That is, where he has been conſcious to, and known any Treaty or Conſultation againſt the Princes Eſtate or Perſon: But as for other cauſes he holds expreſly, that the concealer, and not revealer, is not puniſhable by death, in theſe words, *In aliis autem caſibus etſi ſint comprehenſi in crimine leſæ majeſtatis non putatem eſſe puniendum pœna mortis ſubditum qui non revelaveret*: And that he counſels Princes, even in theſe caſes to uſe clemency and humanity rather then ſeverity, and to excuſe their Subjects, upon any probable

cauſe, from the pain of death. Whence 3. It is alledged, even according to *Clarus* his opinion, concealing not releivant, to inferre the pain of death, except where the concealer has been conſcious to, and heard ſome treaty; that is, deliberate conſultation againſt the Prince or his Eſtate: But ſo it is the words libelled, eſpecially what is alledged to have been heard in Parliament, 1649. ſeems not to import that, being, as would appear, but *volitantia verba*, if any ſuch thing had been heard, which the Defender abſolutely denies; and importing indeed the authour *Cromwels* thought or opinion, that there would be troubles ſtill ſo long as his Majeſty (*horrendum dictum*) were not put to death: But *Clarus lib.* 5. *prax. crim. F. fin. num.* 87. diſtinguiſhing *betwixt cogitationem nudam*, a naked thought, and *tractatum* or a treaty or conſulting, he affirms, that a naked or ſole thought is not puniſhable in any crime, no not in Leſe Majeſty, except only hereſie, when guilt is perfected in the mind: And thereafter *num.* 2. he moves the queſtion, *Sed pone quis non ſteterit in meris terminis cogitationis ſed ulterius etiam proceſſerit ad tractatum cum aliquo de ipſo maleficio committendo*: But ſayes he, put the caſe that any has not contained himſelf within the bounds of a thought, but has proceeded further to treat with any for committing the crime, &c. Thereby making a clear difference betwixt a clear ſole thought and a treaty, about committing the crime: Now the words as they are libelled do not import any treaty with any for committing that horrid.

horrid Murder, but the ſignification only of *Cromwels* damnable thought, what might be the Conſequence of not taking of the Life of our dread Soveraign.

And hence 3. It will follow, that theſe words cannot be ſubſummed releivantly, under that part of the propoſition of the Libell, becauſe that any ſenſe theſe words ſeemed to have as they are libelled, would appear only to import his naked thought of what might be the conſequence of taking the life of our then dread Soveraign, but no purpoſe of his to take the ſame; neither could any preſume, albeit his thought anent that conſequence had been true, (as it is moſt contrary to the truth) that yet any man, in whom there had been the leaſt ſparkle of common reaſon, or conſcience, would have purpoſed to commit, or committed one of the higheſt evils of ſin, to evit (though) very great evils of puniſhment, it being a received rule among men, at leaſt among Chriſtian-men, That the leaſt of the evils of ſin ſhould not be committed to evit the greateſt of the evils of puniſhment.

4. *Gomz* a moſt excellent Lawyer is clear in his third *tomb-variar. Reſolv. de crimine leſæ majeſtatis, num.* 8. That concealing even of treaſon is only then puniſhable, when the concealer might prove it otherwiſe, not *per text. leg. noſtris, in fine cap. de calumniat. & L. quæ. accuſ. capite: cap. de edendo:* whereby it is ſaid, that whoſoever counſels to accuſe, ſhould have his proofes ready, and who accuſeth falſly ſhall be puniſhed as the party

accuſed would be if the accuſation were proved; *Gomz* citeth the Canon Law, *Platia*, *Hippolatus*, and others for their exception, which *a fortiori* holds in our Law, whereby by the 49. *Act Parl.* 11. *Jam.* 6. accuſing of any of treaſon, not being able to prove, ſo that the party accuſed be acquit, being ſo farre reprobate be our Law, that it is declared, that thereby the accuſer ſhall incurre the ſame crime of treaſon whereof he accuſed the other, is a ſufficient warrant to the Defender, not to have revealed that of *Cromwell*, if there had been any ſuch ſpeech, as the Defender never heard any ſuch, except he had witneſs to have proved it; which neither is libelled, nor can be alledged, and therefore he ought alſo to be aſſoilzied therefrom.

5. All theſe Laws anent concealing and not revealing (as the Defender humbly conceives) muſt be underſtood where the treaſon is privately plotted, and the execution thereof is carried on by ſecret conveyance, and which by revealing might be cruſhed and prevented: But it is notour that the Uſurper, as he had the power of armed force, ſo he had the unparalleld boldneſs, to carry on his execrable treaſon moſt openly, and that his power was ſuch, as it was impoſſible for his Majeſties poor Subjects of this Kingdom to reſiſt (nor yet his Majeſties other Kingdomes, thoguh far more powerfull, and that many thouſands of them from their ſouls abhorred the ſaid act) or prevent, and impede the ſame. And if the Defender had heard any ſuch words of the Uſurper (as he has juſt

juſt reaſon to deny he never heard) what ever they ſhould import; what probable reaſon might have been, for not revealing it at that time, from the prevalency and power of that enemy, the condition of our poor Country, and utter impoſſibility to bring him to puniſhment, beſide the want of probation, and ſo what place there were to *Clarus* his counſel of humanity, the Defender leaves to the Commiſſioner his Grace, and the honourable Eſtates of Parliament to judge.

6. What ever relievancy there were in the Defenders concealing, yet his acknowledgement thereof in Parliament 1649. As libelled non relievant to infer or prove it. 1. Becauſe a confeſſion that prejudgeth a party muſt be Judicial, that is, *In Judicio, idque, utroque, Jure, & Civili, & Canonico*, as ſays *Panormitane*, C. *Ex parte Decret. de confeſſ. num.* 16. That it muſt be in Judgement in a Proceſs, wherein he who confeſſeth is convened, as is clear by *Leg.* 6. *F. de Confeſſ.* Where the words are, *Si dum quis convenitur, confiteatur*, that is, If any be convened, confeſs, *&c.* and *Panormitane dicto loco* ſaith, That to the end a Confeſſion may prejudge him who confeſſeth, it muſt be among other requiſites, *ſuper re litigioſa*, that is, on any thing letigious, or any thing in dependance or Proceſs *per. L. in confeſſionibus, F. de Interrog. ait*, The words are, *Confeſſionibus falſis reſpondentes, ita obligantur ſi ejus nomine de quo, quis Interrogatus ſit cum aliquo ſit actio*; that is, any in making anſwer is oblidg'd by falſe confeſſions, if there be any action of dependance againſt him, upon that whereupon he was interrogate and confeſſed, and *Panormitane* is expreſs, *ubi ſupra*, That *non valet confeſſio, facta coram Judice tanquam in judicio, niſi Judex ad hoc ſedeat per Bartol. in lib. ſi confeſſus, F. de cuſtod. reor.* that is, a confeſſion is not valid, though made before a Judge, as in judgement, except the Judge be ſitting on that buſineſs; whence it is clear, That the acknowledgement libelled is no wiſe relievant to infer againſt the Defender what is libelled to have been thereby acknowledged, except it were libelled that he had been in judgement conveened thereupon, or that there was a Proceſs depending againſt the ſaid Defender, wherein he had confeſſed

confeſſed what was libelled in judgment; and the Parliament had been ſitting on that Proceſs, but ſo it is, that neither is it, nor can be libelled, and therefore his naked acknowledgement not relievant, and in effect, if in any diſcourſe before the Parliament, any ſuch word had eſcaped the Defender, (which he no wiſe acknowledges) yet that ſuch a paſſing and indeliberate word, ſhould infer or prove a crime, or ſo high a crime againſt him, he is hopeful the Honourable Court of Parliament will be very far from ever finding; for the very reaſon why confeſſion has ſo much weight, is becauſe it is preſumed that no man will confeſs againſt himſelf in judgment, that whereupon he is convened and proceſſed without great deliberation, which holds not if the acknowledgment be given out of any proceſs, there being no dependant action or proceſſe upon the matter thereof: And therefore the Defender is confident that he needs not trouble the honourable Court with more legall diſpute againſt the relevance of the alleadged acknowledgment.

7. The words or acknowledgment lybelled as ſpoken in Parliament, 1649. Can never be obtruded to the defender, nor that he was conſcious to the Counſell of that horrid murther of his late Majeſty, becauſe it is notour, and he offers him to prove if need be, that the whole Members of the ſaid Parliament, 1649. And he himſelf amongſt others in plaine Parliament were purged by their Solemne Oathes of all knowledge of, or acceſſion to that wicked deſigne in relation to the Kings Majeſty and Houſe of Parliament.

8. And yet he is ſo confident he never ſpake any ſuch thing in Parliament, that the day being condeſcended on, and dyet of ſitting of Parliament, as by all Doctors is agreed it ought to be, then the Defender offers to prove his alibi; he offers to prove (if need be) he was alibi all that dyer, and ſo not in Parliament, where he is alleadged to have ſpoken theſe words, and yet that the Defenders innocency as to the acceſſion or knowledge of that horrid murder, may yet further appear, it is known to many perſons, and to ſome of the Members of this preſent

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Parliament, that when *Cromwell* was in *Scotland*, in *Anno* 1650. (notwithſtanding it is known what malice he had to the Defender at that time) In this particular he expreſſed himſelfe concerning the Marqueſſe of *Argyle*, *That he thought him a man that had neither Courage nor Honour to have been upon ſuch a buſineſſe*; and the Defender thanks God he had ſo much honour and honeſty as in nowiſe to be acceſſory thereunto, and to abhorre the ſame.

9. The Defender ought to be aſſoilzied from their two laſt Articles, as from all the other from the year 1641 to his Majeſties home coming to *Scotland* in *Anno* 1650. becauſe of the ratification and oblivion contained in his Majeſties Treaty at *Breda*, and moſt full and ample Act of ratification and oblivion at St *Johnſtone* and *Strivling*, Anno 1650. and 1651.

And in regard the deeds libelled are either ſuch as preceded the Treaty and Act of Oblivion in Anno 1641. And were thereby pardoned and buryed in Oblivion, or ſuch as intervened after the yeare 1641. before his Majeſties home coming in the yeare 1650. During which time he is in his Lybell charged with ſeverall deeds which are irrelevant, and whereof the Defender is moſt innocent. And for ſuch publick actings as the Defender is charged with and had acceſſion to, the Defender is alſo ſecured and pardoned by his Majeſties Treaty & gracious condiſcendance at *Breda*, which was alſo thereafter ratified in Parliament, or are deeds of neceſſary compliance both for the publick and ſelf preſervation in that unhappy juncture, which complyance as it was ſore againſt his inclination, if it had been in his power to have helped, ſo is not no more then whole Kingdoms did, and far leſs then many condeſcended to; It is in all humility expected, that the Defender ſhould not be brought under the compaſs of Law for the ſame, which were as to make him the ſingular ſufferer in ſo univerſal a guilt, ſo there can be no precedent therefore inſtanced, either out of Scripture, or holy Writ, the Hiſtories of our own, or of other Nations, That a Subject not having contributed to the ſaid uſurpation, but to his power reſiſted the ſame, when the ſaid unjuſt uſurpation prevailed,

prevailed, expelled the lawful Magistrate, detained the unjust usurpation for many years, and tyrannized over the people when the lawful Magistrate could not rule for the time, or protect, or help; That the said subject for his complyance, and using endeavours for necessary, publick, and self preservation, should be indicted of so high a crime, is in all humility conceived, without precedent or parallel, and quite contrary to the current of example and practise, that may be from Scripture and other Histories addueed, and not so sutable to that goodness and natural clemency, whereof his Majesty hath given so abundant proof to others, even the Usurpers and Invaders, and who aided and abated them (without envie be it spoken) and which is not only most agreeable to his Majesties gracious inclination, but very sutable to that advice given by his Royal Father to him, In whose words in one section there are as follows, *Your Prerogative is best shewed and exercised, in remitting rather then in exacting the rigour of the Law, then which nothing is worse*; In respect whereof, and of the Defences above mentioned, the Defender ought to be assoilzied from this Libel, and whole Articles therein contained.

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